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In the Supreme Court of the United States

October Term, 1951
No. .....

AMERICAN CRYSTAL SUGAR COMPANY, a corporation,
Petitioner,

vs.

MANDEVILLE ISLAND FARMS, INC., a corporation, ROSCOE C. ZUCKERMAN and G. K. EVANS,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner American Crystal Sugar Company, a corporation, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in the case of American Crystal Sugar Company v. Mandeville Island Farms, Inc., a corporation, Roscoe C. Zuckerman and G. K. Evans, which judgment was entered March 11, 1952.

Jurisdiction.

The judgment of the Court of Appeals was entered on March 11, 1952. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Opinions Below.

The opinion of the Court of Appeals [R. 822] is reported at ..... F. 2d ..... The Memorandum Opinion of the District Court [R. 226] has not been officially reported.

Statutes Involved.

The statutes involved are Section 4 of the Clayton Act, 15 U. S. C., Section 15, and Sections 1 and 2 of the Sherman Act, 15 U. S. C., Sections 1, 2. Rule 52a of the Federal Rules of Civil Procedure is also involved.

Questions Presented.

This Court in *Mandeville Island Farms, Inc. v. American Crystal Sugar Company,* 334 U. S. 219 (1948), after stating (at p. 222) that "The material facts pleaded . . . stand admitted as if they had been proved for the purposes of this proceeding," reversed a judgment of dismissal of an amended complaint and held: "The allegations are comprehensive and, for the greater part, specific, concerning both the restraints and their effects. They clearly state a cause of action under the Sherman Act." (334 U. S. at p. 246.) On remand, the District Court refused to make a finding of fact that the activities complained of had any effect on interstate commerce, but decided that it was compelled by the Supreme Court's decision to conclude as a matter of law that such activities violated the Sherman Act. The Court of Appeals affirmed, holding that while the opinion of this Court was "ambiguous," and while on the former appeal this Court "had before it only the pleadings, not the evidence, as here," its discussion had so far "ranged beyond them" as to warrant the District Court's action.

In these circumstances, the questions presented are:

(1) Whether the Court of Appeals misconstrued and misapplied the decision of this Court in *Mandeville Island Farms, Inc. v. American Crystal Sugar Company,* 334 U. S. 219, and misapplied the doctrine of the law of the case by holding that the decision on the former appeal upholding the sufficiency of the complaint was a binding determination that the activities complained of in fact had an effect on interstate commerce.

(2) Whether the judgment of the District Court was properly affirmed in the absence of the finding of fact required by Rule 52a of the Federal Rules of Civil Procedure as to a material ingredient of the cause of action sued upon, namely, whether the activities complained of had a substantial economic effect upon interstate commerce.[1]

Statement.

In 1945 respondents Mandeville Island Farms, Inc., and Zuckerman,[2] California sugar beet growers, sued petitioner, a beet sugar manufacturer, for treble damages under the anti-trust laws. The specific restraint alleged was that the price to be paid for California grown and processed sugar beets was determined by a contract formula which included, as one variable, the joint net return

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[1]A subordinate question is whether the Court of Appeals so misconstrued and misapplied this Court's opinion in the *Mandeville* case as to give it controlling effect as regards the admeasurement of damages; a subject expressly left undetermined by this Court.

[2]The *Evans* case was consolidated with the *Mandeville-Zuckerman* action after remand following this Court's opinion and decision in the *Mandeville* case.

from sugar manufactured at the Northern California factories of the three sugar companies operating in that area and sold from those factories during a given crop year. [R. 61-62.] This joint net method was used only during the crop years 1939, 1940 and 1941; both before and after those years the variable was predicated upon petitioner's own (single) net return[3] from sugar manufactured at its Clarksburg, California factory and sold during the year. [R. 60.]

Petitioner moved to dismiss the amended complaint for failure to allege any effects as to sugar, the only interstate commodity involved. The motion was granted. (64 Fed. Supp. 265.) The Court of Appeals affirmed on the same ground. (159 F. 2d 71.) This Court reversed, holding the amended complaint sufficient. (334 U. S. 219.)

On remand to the District Court, petitioner answered and denied the allegations, particularly those which were held to have charged restraints of interstate trade in sugar, and which this Court had taken to be true on the prior appeal. [R. 189.] At the trial petitioner introduced positive, uncontradicted testimony that the joint net method of calculating sugar beet prices had no effect upon price, supply or competitive conditions in the interstate sugar trade, and that the joint net method brought about no

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[3]Under either method of settlement the sugar prices constituted the base for the beet prices, not the reverse. The price of the raw product—the beets—was therefore not a factor in the sales price of the sugar, which was sold competitively in local and interstate markets. [R. 685, 692, 694.]

change whatever in petitioner's sugar marketing methods or efficiency. [R. 694, 696-7, 719-20.] Apparently giving full credence to this testimony, the District Judge refused to make any finding of fact with respect to interstate effect and stated for the record that if he had made a finding he would have found no interstate effect. [R. 810-11.] At the same time, he took the position that he was bound by this Court's opinion on the prior appeal to conclude as a matter of law that interstate commerce had been substantially affected [R. 226, 804, 810-11], saying: "The Supreme Court has spoken and there remains nothing further for me to do but fix damages." [R. 226.] Judgment for respondents followed. [R. 272.]

The Court of Appeals affirmed, on the rationale that, although on the previous appeal this Court had before it "only the pleadings, not the evidence," it had "ranged beyond" the pleadings into "pronouncement" as to "inevitable effect." [R. 825.] The Court of Appeals' ruling was that these "pronouncements" were binding as the law of the case upon both of the lower courts. [R. 829.] The Court of Appeals also stated that although this Court's prior opinion was "ambiguous" with regard to the substantial interstate effect of petitioner's activities, this was a matter for ultimate construction by this Court itself. [R. 825.]

The application of the doctrine of the law of the case in these circumstances was also held to affect the admeasurement of damages, a matter which will be discussed subsequently herein.

Specification of Errors.

The Court of Appeals erred:

1. In misconstruing and in misapplying the opinion and decision of this Court in *Mandeville Island Farms, Inc. v. American Crystal Sugar Company,* 334 U. S. 219.

2. In holding that the pronouncements of this Court on the former appeal (334 U. S. 219) constituted for it, as for the District Court, the law of the case in any respect other than that the amended complaint in the *Mandeville* case, then before the Court, stated a cause of action under the Sherman Act.

3. In failing to hold that the doctrine of the law of the case has no application where, as here, the essential facts upon which the prior decision was predicated were neither proved nor found.

4. In failing to hold that the doctrine of the law of the case has no application where, as here, other and different and not merely cumulative evidence from that passed upon the prior appeal, is adduced upon a subsequent trial.

5. In upholding the failure and refusal of the District Court (a) to determine a factual issue constituting a material ingredient of the plaintiffs' cause of action, namely, whether the activities complained of had a substantial economic effect on interstate commerce; and (b) to make the finding of fact required by Rule 52a of the Federal Rules of Civil Procedure with reference thereto.

6. In holding that the decision of this Court on the former appeal was controlling as to the admeasurement of damages; a subject expressly left undetermined by this Court.

7. In affirming the judgment of the District Court.

Reasons Relied Upon for the Granting of the Writ.

Due to a misconstruction and misapplication of this court's opinion and decision in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, the Court of Appeals has erroneously extended the scope and operation of the doctrine of the law of the case in such important respects as to warrant the exercise by this Court of its supervisory powers.

1. *Misconstruction and misapplication of this Court's opinion.* On the former appeal this Court granted certiorari to review a District Court judgment (affirmed by the Court of Appeals) dismissing the Mandeville-Zuckerman amended complaint as being insufficient to state a cause of action for treble damages under the Sherman Act. (331 U. S. 800; 334 U. S. at p. 221.) In that posture of the case, this Court said that "the legal issues are to be determined upon the allegations of the amended complaint," (334 U. S. at p. 221), and that the material facts pleaded "stand admitted as if they had been proved for the purposes of this proceeding." (334 U. S. at p. 222.) This court stressed that "[w]e deal with the facts before us" (334 U. S. at p. 244), and that the facts before the Court were "as petitioners say." (334 U. S. at p. 239.)[4] In the opinion this Court summarized the complaint, stating that there were "allegations" concerning

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[4]This Court said: "We deal here, as petitioners say, with an industry tightly interwoven from sale of the seed through all the intermediate stages to and including interstate sale and distribution of the sugar. . . ." (334 U. S. at p. 239.)

the contractual arrangements between the refiners and growers and "other allegations" concerning, *inter alia*, the effect of the arrangements on commerce. (334 U. S. at p. 224.)[5]

This Court then measured "the allegations" of "the amended complaint" against the "presently controlling criteria" for testing the sufficiency of a cause of action for treble damages under the Sherman Act. (334 U. S. at p. 235.)[6] Summinig up the situation "concerning the amended complaint," this Court said that "the allegations comprehend all that we have set forth" (334 U. S. at p. 244), and concluded that "the allegations . . . clearly state a cause of action under the Sherman Act." (334 U. S. at p. 246.)[7]

Despite the unequivocal statements of the issue, the then posture of the case and the holding on the former appeal, the court below has joined the District Court in

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[5]"The foregoing allegations set forth the essential features of the contractual arrangements between the refiners and the growers and of the agreement among the refiners themselves. Other allegations were made to complete the showing of violation and injury. They relate specifically to the peculiarly integrated character of the industry, effects of the arrangements upon interstate commerce, and the relation between the violations charged and the injuries suffered by petitioners." (334 U. S. at p. 224.)

[6]"We turn then to consider the questions posed upon the amended complaint that are relevant under the presently controlling criteria. These are whether the allegations disclose a restraint and monopolistic practices of the types outlawed by the Sherman Act; whether, if so, those acts are shown to produce the forbidden effects upon commerce; and whether the effects create injury for which recovery of treble damages by the petitioners is authorized." (334 U. S. at p. 235.)

[7]"The allegations are comprehensive and, for the greater part, specific concerning both the restraints and their effects. They clearly state a cause of action under the Sherman Act." (334 U. S. at p. 246.)

the error of reading this Court's opinion more broadly than it is written or than its holding warrants. Conceding that this Court had before it "only the pleadings, not the evidence" the court below nevertheless held that this Court "ranged beyond" the pleadings into "pronouncement" concerning "inevitable effect."

In short, the court below held that this Court did what, with all respect, it could not have done on the record before it; *i. e.*, make a binding factual decision, without any evidence whatever, that the activities complained of had the proscribed effects on interstate commerce. Under such an interpretation, the plaintiff is not required to prove any effect upon interstate commerce, and it avails the defendant nothing even though the defendant has presented apposite economic facts in the fields of agriculture, manufacturing, and merchandising which squarely rebut the allegations in the complaint as to effects on interstate commerce. The result of this curious interpretation of this Court's prior opinion is that petitioner has been deprived of a trial on the merits as to the key issue in every Sherman Act case, the issue of interstate effects.

Clearly, this situation calls for a determination by this Court as to whether the Court of Appeals has properly construed this Court's former decision. Indeed, both of the lower courts said as much. The Court of Appeals said that this Court's opinion is "ambiguous" on the issue of interstate effects and "must ultimately be construed by the Court itself." [R. 825.] The District Judge said that he "wouldn't be surprised if the court sends this case back for a specific finding of fact on the sugar, but I have felt I should not do that in view of the Supreme Court's decision." [R. 812.] Not only do these statements demonstrate the necessity for review by this Court,

but they reveal serious misgivings by both of the lower courts as to the correctness of their own rulings.

In recent years this Court has frequently granted a writ of certiorari to determine whether a lower court has properly construed and applied one of its decisions on remand.[8] Especially pertinent in this regard is *Prairie Farmer Publishing Co. v. Indiana Farmer's Guide Publishing Co.*, cited in footnote 8, where certiorari was granted in view of petitioner's contention that the Circuit Court of Appeals had misapplied an earlier opinion of this Court in the same case. The judgment of the lower court was reversed by this Court on the ground that the questions of restraint and of injury raised by the record "should have been determined by the Circuit Court of Appeals upon a consideration of the evidence adduced, untrammeled by any supposed expression on that point by this Court." (299 U. S. at p. 159.)

2. *Misapplication of the law of the case.* In holding that the "pronouncements" of this Court on the prior appeal compel the holding that the activities complained of affect interstate commerce, as a matter of law, the Court of Appeals improperly applied the doctrine of the law of the case. What the Court of Appeals has done is to elevate some of the very general language of the opinion concerning the potential effect of the allegations (taken to be true) to the status of law of the case.

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[8] *Prairie Farmer Publishing Co. v. Indiana Farmer's Guide Publishing Co.*, 299 U. S. 156 (1936); *United States v. Gypsum Co.*, 340 U. S. 76 (1950). *Cf. United States v. Spelar*, 338 U. S. 217, 219 (1949); *Reilly v. Pinkus*, 338 U. S. 269 (1949); *United States v. Westinghouse Co.*, 339 U. S. 261, 263 (1950). See *Maggio v. Zeitz*, 333 U. S. 56, 77 (1948).

It is well settled, however, that the *holding* of an appellate court—nothing more—becomes the law of the case upon remand to a lower court. The reasoning and language employed in reaching the result, however well chosen, are not the law of the case.[9] Where, as here, there has been a determination that a complaint states a cause of action, such holding constitutes the law of the case only to that extent and no more. Such a holding in no way relieves the plaintiff from the burden of substantiating his allegations by proof sufficient to support a finding.[10]

In the instant case the respondents' allegations as to the interstate effects of the acts complained of were never substantiated by proof, evidence or *finding*. As the Court of Appeals put it, "The [district] court did not find as a fact, and appears studiously to have refrained from finding, that the activities complained of affected interstate commerce . . ." [R. 824.] In the course of a hearing of a motion by petitioner to strike certain findings, the District Judge went even further, stating: "If I

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[9]*Prairie Farmer Publishing Co. v. Indiana Farmer's Guide Publishing Co.*, 299 U. S. 156, 159 (1936); *Barney v. W. & St. P. R. R. Co.*, 117 U. S. 228, 231 (1886); *Hartford Life Ins. Co. v. Blincoe*, 255 U. S. 129, 136 (1921); *Dezendorf v. Twentieth Century-Fox Film Corp.*, 118 F. 2d 561 (9 Cir., 1941); *A. T. & S. F. Ry. Co. v. Ballard*, 108 F. 2d 768, 772 (5 Cir., 1940), reh'g denied 109 F. 2d 1012, cert. denied 310 U. S. 646; *Magnus Sons Co. v. Orey*, 287 Fed. 1, 4-5 (9 Cir., 1923). *Cf. Int'l Ladies Garment Workers Union v. Donnelly Garment Co.*, 121 F. 2d 561, 563 (8 Cir., 1941); *Rankin Co. v. Outdoor Advertising Ass'n*, 42 F. 2d 152, 154 (2 Cir., 1930), cert. denied 282 U. S. 864.

[10]*Aaron v. Hopkins*, 63 F. 2d 804, 805 (5 Cir., 1933); *Page v. Arkansas National Gas Corporation*, 53 F. 2d 27, 31 (8 Cir., 1931), aff'd 286 U. S. 269; *City of Sedalia v. Shell Petroleum Corporation*, 81 F. 2d 193, 196 (8 Cir., 1936); *Rankin v. Outdoor Advertising Ass'n of America*, 42 F. 2d 152, 154 (2 Cir., 1930), cert. denied 282 U. S. 864.

had made a finding at all, I would have made a finding that it did not affect interstate commerce." [R. 811.][11]

Not only did respondents fail to *prove* the allegations as to effects in interstate commerce which this Court had taken as true upon the prior appeal, but petitioner adduced evidence which negatived the existence of such effects. At the trial, following remand, petitioner introduced positive testimony that the activities complained of had no effect on price, supply or competitive conditions with reference to sugar, or on petitioner's marketing methods or sales efficiency. [R. 694, 696, 697, 719-720.] This testimony was wholly contrary to the assumptions made by this Court from the record before it on the prior appeal.

In the light of this evidence which was not then before this Court, it is submitted that this Court's pronouncements on the prior appeal with respect to interstate effects do not and cannot constitute the law of the case.[12] While the cases cited in Footnote 12 show that the introduction, without more, of new and different and not cumulative evidence makes the law of the case inapplicable, the tes-

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[11]The District Judge also said: "I didn't feel that it had any effect on the price of sugar in interstate commerce. That is the reason I put everything in my conclusions of law." [R. 810.]

[12]*Aaron v. Hopkins,* 63 F. 2d 804, 805 (5 Cir., 1933); *Union Trust Co. v. Woodrow Mfg. Co.,* 63 F. 2d 602, 605 (8 Cir., 1933); *Electrical Research Products, Inc. v. Gross,* 120 F. 2d 301, 307 (9 Cir., 1944), modified in another respect, 125 F. 2d 912 (1942); *Miller's Mutual Fire Ins. Ass'n v. Bell,* 99 F. 2d 289, 292 (8 Cir., 1938); *Meyer & Chapman State Bank v. First Nat'l Bank,* 291 Fed. 42, 44-5 (8 Cir., 1923); *Eikland v. Casey,* 290 Fed. 880, 883 (9 Cir., 1923), cert. denied 254 U. S. 652; *Basevi v. Edward O'Toole Co., Inc.,* 26 Fed. Supp. 41, 43 (S. D. N. Y., 1939); *Mengel Co. v. Inland Waterways Corp.,* 34 Fed. Supp. 685, 689 (E. D. La., 1940).

timony introduced by petitioner has special importance because it was not refuted by respondents, and as earlier indicated, the District Court gave it full credence.

It is of national importance for this Court to review and correct the improper application of the doctrine of the law of the case by the lower courts; an application which has here operated to relieve a plaintiff from the necessity of proving the vital Sherman Act ingredient of effect upon interstate commerce. As recently as 1949 this Court rejected an attempt to broaden the doctrine of the law of the case, and at that time stressed its limited nature. *United States v. United States Smelting Co.*, 339 U. S. 186, 198 (1950). The decision of the Court of Appeals extends the doctrine far beyond its prior (and proper) scope. Only action by this Court can nullify that extension, which, if undisturbed, will lead to confusion and misconception as to the scope and operation of the doctrine of the law of the case in respects which were heretofore believed to have been well settled.

3. *Failure and refusal to make findings of fact.* The Court of Appeals has sanctioned the failure and refusal of the District Court (a) to determine, *on the merits*, a factual issue constituting a material ingredient of the plaintiffs' cause of action, and (b) to make the finding of fact with reference thereto required by Rule 52a of the Federal Rules of Civil Procedure. It will be recalled that in its prior opinion in this case (p. 235), this Court laid down as one of the three requisites for the stating of a cause of action for treble damages under the Sherman Act the necessity of showing, by the allegations of the complaint, that the activities complained of produce the forbidden effects upon commerce; *i. e.*, a substantial economic effect upon interstate commerce. (See *Wickard*

v. Filburn, 317 U. S. 111, 125 (1942).) Such a showing is thus a material ingredient of a treble damage plaintiff's cause of action. It must both be pleaded and proved and the trial court must *find* as to this ingredient to warrant a recovery, for the question of interstate effect is a question of fact,[18] basic to the plaintiff's right of recovery.

The specific requirement for a finding as to the ingredients of a cause of action is prescribed by Rule 52a of the Federal Rules of Civil Procedure, which provides that "the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." The necessity for findings of fact on basic issues is reflected in the cases set out in the margin.[14]

No such finding having been made as to this key issue because of the misconstruction and misapplication by the lower courts of this Court's prior opinion, the following results have ensued: (1) Petitioner has been deprived of a trial on the merits of a key issue going to the heart

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[18]See *Wickard v. Filburn, supra,* 317 U. S. at p. 120 ("actual effects"); *Polish National Alliance v. N. L. R. B.,* 322 U. S. 643, 652 (1944), per Mr. Justice Black, concurring (necessity of "clear findings" as to activities affecting interstate commerce); and see *N. L. R. B. v. Fainblatt,* 306 U. S. 601, 609 (1938); *Industrial Assn. of San Francisco v. U. S.,* 268 U. S. 64, 77 (1925); *N. L. R. B. v. Jones & Laughlin Steel Corp.,* 301 U. S. 1, 43 (1937).

[14]*Marlborough Corp. v. U. S.,* 172 F. 2d 787 (9 Cir., 1949); *Paramount Pest Control Service v. Brewer,* 170 F. 2d 553 (9 Cir., 1948), following *Times-Mirror Co. v. National Labor Relations Board,* 331 U. S. 789; *Dearborn National Casualty Co. v. Consumers Petroleum Co.,* 164 F. 2d 332 (7 Cir., 1947); *National Savings & Trust Co. v. Shutack,* 139 F. 2d 371 (D. C. Cir., 1943); *Helfer v. Corona Products,* 127 F. 2d 612 (8 Cir., 1942).

of respondents' right to recover (for no issue is *tried* unless the trial court makes a finding of fact thereon);[15] (2) the plain mandate of Rule 52a has been ignored; and (3) the judgment rendered is not an "appropriate" judgment within the meaning of Rule 52a, since it is without the support of a finding of fact on a material element of respondents' cause of action.

It follows that if the judgment below is permitted to stand, petitioner will have been deprived of due process of law. And, moreover, if the opinion of the Court of Appeals is permitted to stand, it will also serve as direct authority for precisely the same type of judgment without trial on the merits in any and all pending or future litigation in the federal courts where there has been a prior appeal. That it should be reviewed is made evident by the fact that it is in conflict with every decision of this Court and every decision in the circuits which have been earlier cited herein on the proper scope and application of the doctrine of the law of the case.

5. *Damages.* The misconstruction and misapplication by the Court of Appeals of this Court's opinion in the *Mandeville* case has also resulted in giving this Court's opinion controlling effect with respect to the admeasurement of damages. Assuming respondents' right to recover, it is not in dispute that the amount of their recovery should be measured by the amount which they lost because of the activities of the combination. Under the combination they were paid on the basis of the joint net return. Absent the combination, they would have been paid on the basis of petitioner's (single) net return.

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[15] *Cf. Hughes v. United States,* ..... U. S. ....., 20 U. S. L. W. 4118, 4119 (Feb. 4, 1952).

The difference between the aggregates of these two sets of figures is obviously the amount which respondents lost by reason of the combination. Those figures were all in evidence, to the last penny, and their correctness was *stipulated.*

Yet, the Court of Appeals declined to sanction the application of this definite and certain method of ascertainment of the actual damages because it felt constrained to hold that petitioner's single net return figures for the critical years were tainted, distorted or rendered unreliable by the activities of the combination. The Court of Appeals believed that this conclusion was compelled by the "pronouncements" of this Court on the prior appeal, thus permitting its basic misconception of the effect of this Court's prior holding to permeate both the issues of liability and of damages. The award on the basis approved by the Court of Appeals resulted in a substantial increase (bearing no relation whatever to respondents' actual injury, if any) over what would have been received had the actual single nets for 1939, 1940 and 1941 been utilized. [R. 222-223, 343-344.]

The fact is, however, that this Court on the prior appeal expressly disavowed any intimation or expression of opinion as to the measure of damages. (334 U. S. at p. 227, text and footnote 7.) The failure of the courts below to respect this disavowal constitutes a ground in and of itself for the granting of the writ applied for. See *Prairie Farmer Publishing Co. v. Indiana Farmer's Guide Publishing Co., supra,* 299 U. S. 156, 158, where certiorari was granted because of a misconstruction by a Court of Appeals in declaring a prior opinion of this Court to be the law of the case in respects as to which this Court had expressly disavowed any intimation of opinion.

Conclusion.

It is respectfully urged that, for the reasons above given, the Court of Appeals has so misconstrued and misapplied the opinion of this Court in *Mandeville Island Farms, Inc. v. American Crystal Sugar Company,* 334 U. S. 219 (1948), and has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the District Court, as to call for an exercise of the powers of supervision of this Court; wherefore petitioner respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1951.
No. .....

AMERICAN CRYSTAL SUGAR COMPANY, a corporation,
Petitioner,

vs.

MANDEVILLE ISLAND FARMS, INC., a corporation, ROSCOE C. ZUCKERMAN and G. K. EVANS,
Respondents.

Answer of Respondents to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Application for Attorney Fees in Connection Therewith.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondents, MANDEVILLE ISLAND FARMS, INC., ROSCOE C. ZUCKERMAN and G. K. EVANS respectfully pray that a Writ of Certiorari be denied herein and that they be awarded a reasonable allowance for attorney fees, for the reasons hereinafter set forth.

This cause involves a judgment against petitioner, rendered after trial on the merits, following decision by the Supreme Court, which reversed the District Court's holding that the amended complaint stated no cause of action. After the Supreme Court's decision, the Mandeville complaint that had been before the Supreme Court was amended in various respects, including the allegations as

to damages.[1] Later, Evans sued.[2] His complaint was amended in the same manner as the Mandeville complaint. [R. 194-202.]

Defendant answered. Its answer [R. 127], as amended [R. 149, 206, 210] in the *Mandeville* case, and in the *Evans* case [R. 189, 203, 206], admitted most of the allegations of the complaint as amended. These admissions are ignored by petitioner herein.

The causes were consolidated for trial and tried on the merits after extensive pre-trial preparations.[3] At the trial evidence was received from witnesses, by documents, by written stipulations [R. 212, 225, 335, 522], and by answers to interrogatories by defendant. [R. 738-802.] These are all ignored by petitioner, who would lead this Court to believe that no evidence was received by the trial court except that offered by defendant.[4]

At the outset of the trial, defendant's counsel conceded that there was a combination in restraint of trade between

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[1]R. 113-123, again alleging the accounting counts; R. 139-147, alleging the "50-50" method of paying growers, a conspiracy elsewhere similar to the Northern California one, shipment of substantial portions of plaintiff's beets to Southern California by defendant for refining there, and amending the allegations of damages regarding the Secretary of Agriculture's determination; R. 148, correcting a typographical error.

[2]The *Evans* complaint included the same three crop years as did the *Mandeville* case. A motion to dismiss and strike primarily on the ground of the statute of limitations, was granted as to 1939 and 1940, leaving the *Evans* action pending as to 1941 only. [R. 188.]

[3]Interrogatories, requests for admissions, depositions, inspection of documents and pre-trial hearings before the trial judge.

[4]The record also contains the proceedings of November 13, 1945 (prior to the first appeal), when the amendment was suggested by the trial court, which was the subject of the minority Supreme Court opinion. It appears in the Supplement hereto, page 51, and clearly shows that minority opinion was based upon a misapprehension of the actual facts.

the three refiners in northern California, but claimed (as he did in the former hearing before the Supreme Court), that it was a violation of the California Anti-Trust Act, not the Sherman Act [R. 317-319],[5] in that the price-fix-

---

[5]The California District Court of Appeal in *Cal-Dak Company v. Sav-on Drugs, Inc.* (110 A. C. A. 264), on April 3, 1952, applied the doctrine of *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.* to California practice and has held that no cause of action arises under the California Anti-Trust Act under such circumstances but only under the Sherman Act. This case involved products manufactured and sold only in California but which were a part of sales made in interstate commerce. The California Court stated:

> "Plaintiff's argument that the products it seeks to enjoin defendant from selling at reduced prices were manufactured in California and never left the state and thus have not entered the stream of interstate commerce is not controlling here since it is sufficient if interstate commerce is influenced by plaintiff's sale to defendant. (*United States of America v. Frankfort Distillers,* 324 U. S. 293, 296 (65 S. Ct. 661, 89 L. Ed. 951, 956); *Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U. S. 219, 234 (68 S. Ct. 996, 92 L. Ed. 1328, 1339).)
>
> "Although price fixing agreements by plaintiff, engaged in interstate commerce, may purport to touch only resales within the state of California, it does not follow that they do not influence interstate commerce and bring the transactions within the scope of the Sherman Act. The tendency of permitting plaintiff to keep up the price of its product within this state is to enable it similarly to keep up the price of the same product in other states. Conversely, if plaintiff is unable to maintain the price level fixed by it within this state, the effect may well be to lower the price at which its product is resold in adjoining states.
>
> "In *Mandeville Island Farms v. American Crystal Sugar Co., supra,* the United States Supreme Court held the Sherman Act was violated by a restraint relating to intrastate or local activities because of its actual or threatened effect upon interstate commerce. The Court said, 334 U. S. at page 234 (92 L. Ed. 1328, 1339), 'For, given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence. If so, the restraint must fall, . . .'"

ing combination did not produce a substantial economic effect upon interstate commerce. [R. 318.] He admitted the conspiracy but insisted that "whether it is unlawful or not" was for the Court to decide. [R. 351.] The record also shows [R. 318]:

> "The Court: Now, why don't you be just as frank in that respect, counsel?
>
> Mr. Works: I would be happy to.
>
> The Court: That under your theory, if I happen to have five acres of beets, then I would never have any remedy, because I couldn't prove that that had a substantial effect. You could make any kind of a conspiracy to prevent me from getting a fair price for my beets, and yet that wouldn't have any substantial effect. The amounts involved here are substantial.
>
> Mr. Works: Certainly, your Honor, they are."[6]

During the trial, the evidence showed that the contracts between the growers and the refiners were called "50-50" contracts because the net return from the sale of the sugar was divided approximately "50-50" between the grower and the refiner. [Finding 7B, Supp. 37.] The attorney for petitioner described the relationship [R. 322]:

> "They" (*i. e.*, the growers) "were growing for us. Your Honor knows this sugar setup. It was a profit-sharing proposition, pure and simple. We would sell

---

[6]The amounts here involved were 22,355.6 tons of sugar beets in 1939, 25,430.3 tons in 1940, and 14,144.7 tons in 1941 in the original suit and 4,401.7 tons in 1941 in the *Evans* suit, as compared with *Wickard v. Filburn*, 317 U. S. 111, 125, cited by petitioner, which involved only 239 bushels of wheat. The conspiracy covered all of Northern and Central California and a like conspiracy covered all of Southern California. [Findings 9-a and 9-b—Supp. 40.]

> the sugar, figure the net return, and they would get a certain percentage of what we got. They were in the same boat we were. If we made money, then they made money. If we lost money, then they would lose money. I am talking about the single net now."[7]

The evidence showed that the sugar made from the beets was sold in interstate commerce throughout the United States [Finding 6c, Supp. 36], and the price the grower received for his beets was determined by the price received in interstate commence from the sale of the sugar refined from the beets. The "profit-sharing proposition" in which the grower and the refiner were "in the same boat" included the interstate commerce involved in the sale of the sugar produced from the beets, because the "profit" from the price secured from such interstate sale of sugar was what was divided. The Supreme Court's opinion referred to this as "most clearly" showing "the interdependence and inextricable relationship between the intrastate and the interstate effects of the combination." [Supp. 23 and 24.] Petitioner does not discuss this feature of the contract nor this portion of the Court's opinion, yet still insists that interstate commerce is not involved!

Petitioner's verified answer to Interrogatory 87 admitted that the three conspirators had met and agreed upon the joint contract [R. 780-1, 452], but petitioner did not produce its officers or representatives at such

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[7]"Single net" refers to a method of paying for beets on a formula in which the average net return secured for the sugar sold by the purchasing refiner in interstate commerce is used. In "joint net," the average net return of several refiners is used. Under "single net" each refiner pays a different price. Under "joint net" they all pay the same price; in other words, they fix prices; and that is illegal *per se*.

meeting or anyone else who was present nor did petitioner explain their absence. (See discussion, *infra.*)

The trial court twice asked petitioner to produce direct evidence as to the reason for the change from the single-net-return non-conspiracy competitive system of 1938 to the joint-net return conspiracy method of 1939-40-41. [R. 398-9, 452-3.] Petitioner recognized its duty to produce such explanation [R. 401] but did not do so in a way satisfactory to the trial judge. [R. 453, 729-733.] Near the close of the trial, the trial judge asked counsel for defendant [R. 729 *et seq.*]:

> "Now I would like to ask you, Mr. Works, outside of the element of damages, what material allegations in the complaint do you contend that the plaintiff has not proved? . . . The reason I am asking that question is this. You have contended that they have to prove all the material allegations in the complaint. I have this thought in mind. The Supreme Court held that the material allegations of the complaint stated a cause of action.
>
> Mr. Works: Yes, no question about that.
>
> The Court: I am wondering what you contend now are the factors they have not proven."

That was the "jack-pot" question. Petitioner not only had the opportunity but the duty to speak. The Supreme Court had held that the amended complaint stated a cause of action. If the plaintiffs had proved the material allegations thereof, they had proved a cause of action and the only remaining element would then be that of damages. The trial court felt that the required proof had

been made and called upon counsel for defendant to state wherein that proof was lacking. Mr. Works replied:

> "You and I, your Honor, have had a slight difference on the question of the effect upon interstate commerce. . . . The consumer of sugar in interstate commerce . . . he is the fellow the Sherman Act is designed to protect. . . . I am not asking your Honor to agree with me at this point, but I am stating that we would like to discuss that matter in the brief."

Thus the only material fact that petitioner then claimed had not been proved by plaintiff was an injurious effect upon the *consumer* of sugar because the Sherman Act, according to petitioner, was for the sole protection of the consumer.

Briefs were filed and the trial court, after consideration of the briefs, decided against this contention of petitioner and by memorandum ordered judgment for plaintiffs. Petitioner (p. 5) takes an isolated statement from this memorandum, out of context, and contends that the trial court construed the Supreme Court decision as holding that it had nothing to do but to fix damages! The trial court took no such position.

It was then necessary for findings of fact and conclusions of law to be prepared. Plaintiffs' counsel was instructed to prepare drafts and did so. Petitioner objected and asked the Court to make findings of fact in which the specific activities of the combination and conspiracy should be found to be in restraint of trade but to make *a conclusion of law* as to whether the activities found in the findings of fact had a substantial effect upon interstate commerce and hence came within the purview of the Anti-Trust Laws. [R. 242-3.]

Thereupon, the trial court followed petitioner's request. It made Findings of Fact containing specific findings as to the activities of petitioner. We set them forth in our Supplement. [p. 31, *et seq.*] We repeat here merely a few portions:

Finding 9 reads:

> "9. Some time in 1938, at a time unknown to plaintiffs but particularly within the knowledge of defendant, but which defendant did not disclose to the plaintiffs or to the court, said defendant illegally and wrongfully entered into a conspiracy with each and every one of the other manufacturers of sugar in California whose plants were located north of the 36th parallel, to monopolize and restrain trade and to unlawfully fix prices to be paid the growers of sugar beets, and, as a part of said conspiracy, said defendant and said two other manufacturers (Holly and Spreckels) agreed among themselves to do and did among other things during the crop years 1939, 1940 and 1941, the following:
>
> "(a) Each no longer competed against any of the others as to the price to be paid the growers for sugar beets raised in Northern California;
>
> "(b) Each paid the same price to growers of sugar beets in Northern California, to-wit: The price determined upon the average net returns from the sale of all sugar sold in interstate commerce from the factories of said conspirators north of the 36th parallel in California during that crop year and did not pay the growers upon the net returns from the sale of sugar sold from the Northern California factory or factories of the particular manufacturer to whom the particular grower was under contract;
>
> "(c) Each no longer competed with the others, but instead, and regardless of the efficiency or lack of

efficiency of the sales or manufacturing organizations of any of the conspirators, and regardless of the price at which sugar was sold from any particular refinery or from any particular manufacturer's refinery or refineries, or by any particular manufacturer, paid all growers of sugar beets in Northern California the same price for the same amount of beets of the same sugar content. A similar method of paying growers on an average net return was used throughout Southern California during the same period;

"(d) They did not pay the growers of sugar beets a reasonable price for their beets. Each of said conspirators sold seeds to, entered into contracts with and bought beets only from growers who signed a standard printed form of contract prepared by said manufacturers and practically identical in all material terms. Farmers contemplating or desirous of growing sugar beets in Northern California either signed such a contract with one of said conspirators or could not get seeds to plant sugar beets or a practical market to sell their marketable beets. A similar method was used during said years throughout Southern California;

"(e) Said prices agreed upon by defendant and its conspirators to be paid by them and paid by them to plaintiffs and other sugar beet growers in Northern California during said period, are set forth in said Exhibits 'B,' 'C,' and 'D' and were and are not the reasonable prices for sugar beets." [Supp. pp. 39-40.]

Finding 10 reads:

"10. Prior to the 1939 crop season, the various manufacturers of sugar in Northern California, including defendant, competed in interstate commerce with each other as to the performance, ability and efficiency of their manufacturing, sales and executive

departments, and each strove to increase sales return and decrease sales expenses and to operate as efficiently as possible in order to increase the unit return to growers of sugar beets under said standard contract and thus to attract beet growers to sign contracts with them. During the crop year of 1938, the net receipts of sales of sugar (less allowances, federal excise taxes, freight to destination, and cash discounts to customers) secured by defendant per 100 pounds were greater than the average net receipts of the other manufacturers of beet sugar in Northern California. As a result thereof, during the crop year 1938, sugar beet growers in Northern California, north of the 36th parallel, who had contracted with defendant, received on the average from 28 cents to 50 cents per ton more for sugar beets delivered to defendant corporation under said standard contract than did growers of beets of identical sugar content delivered to the other manufacturers of beet sugar in Northern California." [Supp. pp. 40-41.]

Finding 11 reads:

"During said crop seasons of 1939, 1940 and 1941, as a direct result of said conspiracy, expected and planned by said conspirators, there was no longer competition between the conspirators as had previously existed in their purchase of sugar beets." [Supp. p. 41.]

Finding 12 reads:

"As a direct, expected and planned result of said conspiracy, the free and natural flow in the purchase of sugar beets was intentionally hindered and obstructed. As a further direct, expected and planned result of said conspiracy, said three manufacturers operated, in so far as the growers' returns were con-

cerned, as if they were one corporation owning and controlling all sugar beet factories in Northern California but with three completely separate overheads and selling expenses." [Supp. p. 41.]

Finding 17(D) reads:

"(D) Had it not been for said plan and conspiracy and if plaintiffs had received the reasonable value of their sugar beets in a market unfettered and unhampered by said combination, plan and conspiracy, Mandeville Island Farms, Inc., would have received $30,071.12 more and plaintiff Roscoe C. Zuckerman would have received $3,528.00 more and plaintiff Evans would have received $1,100.00 more than each did receive under said contracts and each of said plaintiffs respectively sustained damages accordingly, none of which damages have been paid. These amounts as found herein are on the conservative side." [Supp. p. 45.]

Finding 19 reads:

"By reason of the foregoing acts of the defendant and its conspirators, the price of sugar beets was illegally fixed, and an illegal monopoly was established, to the damage of plaintiffs as aforesaid." [Supp. p. 46.]

Then, as Conclusions of Law, the Court found [Supp. 48-9]:

"3. Prior to the crop year 1939, defendant wrongfully and unlawfully entered into, and during the crop years 1939, 1940 and 1941 remained and operated under, a combination and conspiracy which was in restraint of trade and commerce among the several states and wrongfully and unlawfully conspired with other persons to monopolize part of the trade and

commerce among the several states, in violation of and contrary to the Sherman Anti-Trust Act of the United States (26 Stat. 309, 38 Stat. 731, 15 U. S. C., Secs. 1, 2, 7, 15) and did and performed acts forbidden by said Act. Plaintiffs are persons injured in their businesses and property by said acts of defendant by reason of the defendant doing said things forbidden by said Act. These conclusions of law are in accordance with the law as held by the decision of the Supreme Court of the United States heretofore made in the Mandeville case No. 4643 334 U. S. 219), which decision is binding upon this court.

"4. Plaintiffs were injured and damaged in their businesses by reason of said matters forbidden in the anti-trust law in the following sums: . . ."

Judgment was then entered. Petitioner made no motion for new trial, nor a motion before the trial court to have the above Conclusions of Law made into a finding of fact. It caused the trial court to use a conclusion of law as to this subject instead of a finding of fact and at no time claimed before the trial court that it should have used a finding of fact. Then for the first time on appeal petitioner claimed that the judgment should be reversed because of this alleged error which it had invited and caused!

Petitioner makes no attack on any ruling of the Court during trial, nor on any finding except as to the *measure* of damages. It ignores the admissions contained in the pleadings, the numerous stipulations of fact and answers to interrogatories received in evidence, the testimony (except isolated portions twisted to its favor) and most of the findings of fact and conclusions of law. It ignores all

inferences that must be drawn to support the judgment and the fact that it is an appellant faced with the duty of showing prejudicial error and presents a garbled and incorrect account filled with misstatements and half-truths.

It sets forth seven specifications in which it claims that the Court of Appeals erred. We discuss each briefly here and later in more detail.

Petitioner contends that the Court of Appeals erred:

> "1. In misconstruing and in misapplying the opinion and decision of this Court in *Mandeville Island Farms, Inc. v. American Crystal Sugar Company*, 334 U. S. 219."

Answer. The Court of Appeals did not misconstrue or misapply that opinion but applied and construed it correctly, as it had been by numerous other cases and law review articles.[8] What petitioner really means is that the

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[8] *Shore v. Building & Const. Trades Council*, 173 F. 2d 678, 680 (C. A. 3); *Gardella v. Chandler*, 172 F. 2d 402, 405, 414 (C. A. 2); *Shotkin v. General Electric*, 171 F. 2d 236, 239 (C. A. 10); *United Brotherhood v. Sperry*, 170 F. 2d 863, 868 (C. A. 10); *Local 36 of International Fishermen v. U. S.*, 177 F. 2d 320, 327, 328 (C. A. 9); *U. S. v. Chrysler Corporation*, 180 F. 2d 557 (C. A. 9); *National Labor Relations Board v. Local 74*, 181 F. 2d 126, 130; *Stauffer v. Exley*, 184 F. 2d 962, 966 (C. A. 9); *Universal Milk Bottle Service, Inc.*, 188 F. 2d 959 (C. A. 6); *U. S. v. Standard Oil Co.*, 78 Fed. Supp. 850, 860; *LeBaron v. L. A. Bldg. and Const. Trades Council*, 84 Fed. Supp. 629, 637; *U. S. v. St. Louis Dairy Co.*, 77 Fed. Supp. 853, 860, 861; *U. S. v. Greater Kansas City Retail Coal Assn.*, 85 Fed. Supp. 503; *Balogs v. Brannan*, 87 Fed. Supp. 119; *U. S. v. Lorain Journal Co.*, 92 Fed. Supp. 794, 798; *Cal-Dak Co. v. Sav-On-Drugs, Inc.*, 110 A. C. A. 264 (Cal. Dist. Court of Appeal, Apr. 3, 1952); 58 *Yale Law Review* 1161, 1170; 17 *George Washington Law Review* 58; 18 *The University of Chicago Law Review* 171, 182, 183; 24 *Tulane Law Review* 76, 88.

Court of Appeals followed the ruling of the former case that the Sherman Act "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers" [Supp. p. 17], but also condemns price-fixing by purchasers. [Supp. pp. 16-17.]

> "2. In holding that the pronouncements of this Court on the former appeal (334 U. S. 219) constituted for it, as for the District Court, the law of the case in any respect other than that the amended complaint in the Mandeville case, then before the Court, stated a cause of action under the Sherman Act."

Answer. Plaintiff proved, and the trial court found as true, every material allegation of the amended complaint then before the Supreme Court. What petitioner means by this specification is that the statement of the Supreme Court that the Sherman Act "is comprehensive in its terms and coverages, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated" [Supp. p. 17], is mere meaningless dictum!

> "3. In failing to hold that the doctrine of the law of the case has no application where, as here, the essential facts upon which the prior decision was predicated were neither proved nor found."

Answer. Every essential fact upon which the prior decision was predicated was proved and found. Petitioner was twice asked by the trial court to explain the reason for the change from the single-net to the joint-net [R. 398-9, 452-3], but failed to give a satisfactory explanation. [R.

452-3, 731.] Petitioner was asked what "material allegation of the complaint" it contended "that the plaintiff has not proved" [R. 729 *et seq.*] and petitioner replied that the only matter unproved was that the price of sugar had been raised to the ultimate purchaser! [*Idem.*] That is based upon petitioner's contention that the Sherman Act only protects consumers. [R. 730.] The complaint before the Supreme Court contained no allegation that the price of sugar was raised to the consumer and therefore it was not essential to prove it.

> "4. In failing to hold that the doctrine of the law of the case has no application where, as here, other and different and not merely cumulative evidence from that passed upon the prior appeal is adduced upon a subsequent trial."

Answer. The trial court found as true every material allegation of the complaint before the Supreme Court and defendant makes no attack upon any finding. It admits a conspiracy in restraint of trade but contends that such conspiracy violated the state, not the federal, Anti-Trust Act. But instead of producing at the trial the persons who represented it at the conference at which the conspiracy was arranged, it produced subordinates who never even knew of the conspiracy, and cites their testimony as conclusive proof of its innocence. Such tactics, as we will show, have been tried before in Sherman Act cases, but have not been successful. (*Interstate Circuit v. U. S.*, 306 U. S. 208, 225, 226.) The law of the case was properly applied.

"5. In upholding the failure and refusal of the District Court (a) to determine a factual issue constituting a material ingredient of the plaintiffs' cause of action, namely, whether the activities complained of had a substantial economic effect on interstate commerce; and (b) to make the finding of fact required by Rule 52-a of the Federal Rules of Civil Procedure with reference thereto."

Answer. The District Court found as true every material allegation of the complaint before the Supreme Court. At the request of the defendant, it found as a conclusion of law the effect upon interstate commerce and the violation of the Sherman Act. If that had been put under the heading "Finding of Fact," petitioner would have no argument—but it was put under the heading "Conclusion of Law" at petitioner's request. Petitioner in the former appeal, as we will show, called it a conclusion. So did the Supreme Court, which declared that the complaint contained sufficient allegations had it been deleted. A finding of fact is still a finding of fact though labeled a conclusion and a party cannot complain of an error (if it be error) that he himself invited.

"6. In holding that the decision of this Court on the former appeal was controlling as to the admeasurement of damages; a subject expressly left undetermined by this Court."

Answer. The Court of Appeals made no such holding. It applied as to damages the decisions of the Supreme Court in *Eastman Kodak Co. v. Southern Photo Materials Company,* 273 U. S. 359, 376; *Story Parchment v. Paterson Parchment Paper Co.,* 282 U. S. 555, 561, and *Bigelow v. R. K. O. Radio Pictures,* 327 U. S. 251, 254. The decision on the former appeal held that the joint-return contracts were violations of the Sherman Act as illegal

price-fixing agreements. Plaintiffs were entitled to have received the reasonable value of their sugar beets which they would have received had there been no conspiracy. Their damages were the difference betwen that reasonable value and which they actually received. The trial court, after hearing the evidence, found that difference as a fact. The evidence sustains that finding.

"7. In affirming the judgment of the District Court."

Answer. That judgment was correct and should have been affirmed.

Attorney Fees.

The Sherman Act provides for the award of attorney fees to a successful plaintiff. The trial court awarded such fees to plaintiff in the sum of $25,000, covering services through entry of judgment in the trial court. The Court of Appeals awarded an additional $4,000 covering services in that Court, following although not citing, the rule laid down in *American Can Co. v. Bruce's Juices, Inc.*, 190 F. 2d 73, 74; *Laufenberg, Inc. v. Goldelblatt Bros., Inc.*, 187 F. 2d 823, 825, and *Jerome v. 20th Century-Fox Film Corporation*, 165 F. 2d 784, 785. That award covered service only in that Court. But respondents have been put to the necessity of employing attorneys in connection with preparation of this opposition to the petition for certiorari and unless respondents are awarded additional attorney fees, their relief will not be as complete as the statute contemplates. Either the Supreme Court should make the award in its denial of the petition for certiorari, or should in its order provide for it to be fixed by the District Court. $2500 is a reasonable attorney fee for services in connection with this answer.

The Law of the Case.

Where a decision is based upon more than one ground, none is dictum—each is of equal authority. (*U. P. R. R. Co. v. Mason City R. R. Co.,* 199 U. S. 160; *Richmond Screw Co. v. U. S.,* 275 U. S. 331, 340; *Mass. v. U. S.,* 333 U. S. 611, 623; *United States v. T. I. & T. Co.,* 265 U. S. 472, 486.) With this in mind, we present what we feel is the law of the case:

1. "The amended complaint states a cause of action arising under the Sherman Act, Sections 1 and 2." [Supp. pp. 7, 28.]

2. "The entire allegation contained in Paragraph IX of the Amended Complaint" (to-wit: "Thereupon . . . defendants illegally and wrongfully entered into a conspiracy with each and every one of the other manufacturers of sugar . . . in northern California . . . to unlawfully monopolize and restrain trade and commerce among the several states . . .") "could have been elided without affecting the substance or validity of the remainder of the amended complaint to state a cause of action under the Sherman Act. There was more than enough without it." [Note 24 of Sup. Ct. Opin., Supp. p. 27.]

3. "The entire sequence of growing the beets, refining them into sugar and distributing it, under the arrangements set forth" (in the complaint) . . . (is) . . . "a chain of events so integrated and taking place in interstate commerce or in such close and intimate connection with it, that, for the purpose of applying the Sherman Act, the complete sequence is an entirety and no part of it can be segregated from the remainder so as to put it beyond the statute's grasp." [Supp. p. 8.] "The artificial and mechanical separation of 'production' and manufacturing

'from commerce' without regard to their economic continuity . . . no longer suffices to put either production or manufacturing and refining processes beyond reach . . . of the statute." [Supp. p. 10.]

4. "The agreement (here involved) is the sort of combination condemned by the Act, even though the price-fixing was by purchasers and the persons especially injured under the treble damage claim are 'sellers and not customers and consumers.'" [Supp. pp. 16 and 17.] "This is true 'even if it is assumed that the final sum of the conspiracy was control of the local sugar beet market.'"

5. "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these." [Supp. p. 17.]

6. "Nor is the amount of the nation's sugar industry which the California refiners control relevant as long as control is exercised effectively in the area concerned." [Supp. pp. 17-18.]

7. "Congress' power to keep the interstate market free of goods produced under conditions inimical to the general welfare . . . may be exercised in individual cases without showing any specific effect upon interstate commerce. . . . It is enough that the individual activity when multiplied into a general practice is subject to Federal control." [Supp. p. 18.]

8. "Mere change in the form of the commodity or even complete change in essential quality by intermediate refining, processing or manufacturing does not defeat application of the statute to practices occurring either during those processes or before they begin, when they have the effects forbidden by the Act." [Supp. pp. 19-20.]

9. ". . . in this case the mere fact that the price fixing related directly to the beets did not sever or render insubstantial its effect subsequently in the sale of sugar." [Supp. p. 20.]

10. "The joint return contract here involved is a restraint on trade and a monopoly which causes the destruction of 'the only competitive opportunity for the grower to market his produce.'" [Supp. p. 22.]

11. "By their agreement the combination of refiners acquired not only a monopoly of the raw material but also and thereby control of the quantity of sugar manufactured, sold and shipped interstate from the north California producing area." [Supp. p. 23.]

12. "These restrictive and monopolistic effects, resulting necessarily from the practices allegedly intended to produce them, fall squarely within the Sherman Act's prohibition, creating the very injuries they were designed to prevent, both to the public and to private individuals." [Supp. p. 24.]

Federal appellate courts are free to draw inferences and conclusions from the findings of fact. (*Western Union Tel. Co. v. Bromberg,* 9th Cir., 143 F. 2d 288, 290), and from documentary evidence. (*Pacific Portland Cement Co. v. Food Mach. & Chem. Co.,* 9th Cir., 178 F. 2d 541, 548.) The Supreme Court has done this from the contracts herein involved and from the allegations of fact (after the conclusions have been elided), in the complaint before it *and the same allegations have now become findings of fact after judgment.* The District Court and the Court of Appeals, drew the same inferences and the same conclusions as the Supreme Court did in its prior decision.

Petitioner brushes the law of the case aside by stating on page 12: "In light of this evidence which was not then before this court, it is submitted that this court's pronouncements on the prior appeal with respect to interstate effects do not and cannot constitute the law of the case." The brief in note 12 cites numerous cases, not one of which was a Sherman Act case and not one of which sustained the point for which it was cited! The complaint contained various allegations of fact. The Supreme Court held that if these facts were proved, then there would have been a violation of the Sherman Act. Each of these facts were proved and the Court made a specific finding as to each. Therefore, the judgment must be sustained.

Petitioner, at page 10, says: "In recent years this court has frequently granted a writ of certiorari to determine whether the lower court has properly construed and applied one of its decisions on remand." Six cases are cited as authority in note 8 on page 10. Only one of these cases involves the application of a decision on remand and that was *Prairie Farmers Publishing Co. v. Indiana Farmers Guide Publishing Co.*, 299 U. S. 156, but it does not aid petitioner. There the Court stated at page 158:

> "We are unable to escape the conclusion that in holding the evidence sufficient to sustain a verdict for respondent upon the issue of unlawful restraint or practices and consequent injury to respondent, the Circuit Court of Appeals felt itself controlled by our decision. That was a misinterpretation. We expressed no opinion upon that question. On the contrary, after dealing with the question of interstate commerce and holding that it was not necessary that the restraint or monopoly should affect all the busi-

ness of the kind throughout the country, but might relate to the part of it carried on in a particular section, we said:

" 'We intimate no opinion whether, upon the question of restraint or monopoly, or upon the question of injury to petitioner (respondent here) or its business, the evidence is sufficient to warrant a verdict in its favor.' "

Here the Supreme Court went much further—it held that the contracts involved under the factual conditions alleged in the complaint were illegal under the Sherman Act. The trial court has found as true every allegation of fact contained in the complaint before the Supreme Court. Therefore, the judgment was proper.

The only other Sherman case after remand that petitioner cites is *Rankin v. Outdoor Advertising Association,* 42 F. 2d 152, which, like the case at bar, involved an appeal from judgment for plaintiff, after decision by the Supreme Court reversing the judgment dismissing the complaint for not stating a cause of action. The Court stated at page 154:

"Much of the argument contained in the rather voluminous briefs filed, though ostensibly made on the question of sufficiency of proof, is directed to what has already been decided by the Supreme Court in Ramsay v. Bill Posters, *supra.* It should be needless to point out that it is idle to ask us now to discuss the sufficiency of these complaints, for the defendants are bound to regard that as established, and so are we. . . . What is now open relates to the adequacy of the proof on which the verdicts under-

lying the judgments were rendered and errors, if any, committed during the trial in the District Court. Not only have the defendants, including Briggs, and Ivan B. Nordhem Company, whose nonparticipation in the unlawful combination and conspiracy is especially urged . . . failed to point out lack of proof in support of a single essential allegations, but a careful inspection of the lengthy record filed discloses that it was impossible for them to have done so. The identical allegations which have already been held sufficient to state a cause of action have been proved so abundantly that we pass without delay to a consideration of the other phases of this appeal with only the additional observation that the decree of 1916 ran against all these defendants and under the Clayton Act (15 U. S. C. A. Sec. 16) was itself *prima facie* evidence of their violation of the law."

So, in the case at bar, the sufficiency of the complaint cannot again be discussed. Yet that is what petitioner is doing. That sufficiency has been established. The trial court has found that every material allegation of the complaint is true. Petitioner does not attack any of the findings and therefore the judgment must be affirmed. Petitioner, on page 11 cites, in note 10, various cases holding that a determination that a complaint states a cause of action "in no way relieves the plaintiff from the burden of substantiating his allegations by proof sufficient to support a finding." With that, both the trial court, ourselves, and the Court of Appeals, agreed. The proof was supplied and the findings so establish.

Petitioner Ignores the Law of the Case and Misstates the Evidence and the Holding of the Trial Court. The Findings Support the Judgment. Petitioner's Real Objection Is That Matters Included at Its Own Request Under "Conclusions of Law" Should Have Been Put Under "Findings of Fact" Although the Supreme Court and Defendant Has Called Them "Conclusions." That Is No Basis for Reversal.

Petitioner ignores the law of the case and treats the former Supreme Court decision as if decided on technical procedural matters, and still insists (as it did in the prior appeal) that the Sherman Act applies only to consumers and not farmers, despite the holding of the Supreme Court that it applies to everybody, including plaintiffs herein. Petitioner claims that because there was no specific proof that the price of sugar was raised to the consuming public, therefore no cause of action was proved under the Sherman Act, despite the effect that the conspiracy had upon the producers of beets. Suppose that during the period of O. P. A. the maximum price of sugar to the consumer was fixed and that every refiner of beet and cane sugar in the United States entered into one conspiracy whereby they fixed the prices to be paid beet and cane growers throughout the country. Under petitioner's argument there would be no violation of the Sherman Act because under the O. P. A. the price of sugar to the consumer could not be raised by the conspiracy! In language uncomplicated by legalistic double-talk, that is the position petitioner takes. The Supreme Court has held contrary to that contention. Evidence as to specific effect on con-

sumers was not necessary. However, we subsequently show the effect on sugar and sugar purchasers.

The District Court did not hold, as petitioner states, that the Supreme Court decision constituted "the law of the case as to the fact of liability without the necessity of proof." Much evidence was received. Twice the trial court asked for an explanation of the change from the single to the joint return [R. 398-9, 452-3], and although petitioner twice promised to produce satisfactory explanation [R. 401, 463] it failed to do so. [R. 452-3, 731.] If the District Judge had held as petitioner claims, he would not have been interested in such explanation.

Another complete answer to petitioner's contention is shown by what happened after most of the evidence was in [R. 729, *et seq.*]:

> "The court: . . . Now, I would like to ask you Mr. Works, outside of the element of damages, what material allegations in the complaint do you contend that the plaintiff has not proved? . . . You have contended that they have to prove all the material allegations in the complaint. I have this thought in mind, the Supreme Court held that the material allegations of the complaint stated a cause of action, that is the law of the case.
>
> Mr. Works: Yes, no question about that.
>
> The Court: I am wondering what you contend now are the factors they have not proven.
>
> Mr. Works: You and I, your Honor, have had a slight difference on the question of the effect upon interstate commerce. . . . The consumer of sugar in interstate commerce, . . . is the fellow the Sher-

man Act is designed to protect,[9] the only evidence in this record was given today on that issue. That was that this understanding or agreement with reference to the beets had no effect upon price, supply, or competitive conditions with reference to sugar in interstate commerce. I am not asking your Honor to agree with me at this point, but I am stating that, and we would like to discuss that matter in the brief.

The Court: The thought that I have in mind is this: Of course, I agreed with you originally that beets did not affect interstate commerce. The Supreme Court held otherwise. . . .

The Court: . . . I realize there has been considerable testimony here from officers of the company, but I haven't found any explanation, at least a satisfactory explanation, for their change of method.

I read the president's explanation in the deposition during the noon hour. If I recall correctly, his explanation was it was to keep the growers from switching around from place to place; in other words, keep a stabilized group of growers which they could depend upon as a source of beets. Now, that was stifling competition. That kind of an agreement, you can't get away from it, is stifling competition. . . .

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[9]This is the heart of petitioner's argument; but the Supreme Court held in its former opinion: "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any one of these. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."

Mr. Works: I don't think I am at great variance with what your Honor says.

The Court: Then if they stifled competition, it was an advantage, the change, because they brought it about, the refiners, they adopted the change of method here. Probably they found it working successfully in other places and thought they would try it here. But it was an advantage to them to change that contract, and if it was an advantage to them, to the refiners, then it would have to be at the expense of the growers.

* * * * * * * *

The Court: Of course, outside of that angle, I am going to have to read the briefs and the various exhibits, . . ." (p. 733).

Yet petitioner, with complete disregard of its burden as an appellant, twists isolated parts of the record from the rest, and without any actual basis, claims that the trial court held the Supreme Court decision relieved plaintiff of proving the allegations of the complaint, and makes the astounding statement (p. 14) that petitioner has been deprived of a trial on the merits of a key issue going to the heart of respondents' right to recover and the further statement that petitioners have been "deprived of due process of law" (p. 15). These statements are unfounded.

Petitioner argues that since no *haec verba* finding of fact was made that "the activities complained of had a substantial, economic effect upon interstate commerce" the cause must be reversed for violation of Rule 52a. There are four answers: First, no such *haec verba* allegation

was contained in the amended complaint held by the Supreme Court to state a cause of action; second, the Supreme Court held that, as a matter of law, the allegations of fact in the amended complaint, *eliding all conclusions,* showed the required effect upon interstate commerce and the trial court found those same allegations to be true; third, the trial court found as a conclusion of law, at petitioner's request, what petitioner now claims should be in the findings of fact; fourth, the evidence showed the required effect.

Petitioner completely ignores all the evidence that was received by the Court and argues its appeal on the false assumption that there was no evidence. Petitioner quotes from the opinion of the Supreme Court, "The material facts pleaded, which stand admitted as if they had been proved for the purposes of this proceeding may be summarized as follows:", and then omits the "material facts" so summarized which the trial court found to be true! The findings clearly show that practically every statement of fact alleged in the complaint and referred to by the Supreme Court was found to be true.

The trial court found as conclusions of law [Supp. pp. 48-49]:

> "3. Prior to the crop year 1939, defendant wrongfully and unlawfully entered into, and during the crop years 1939, 1940 and 1941 remained and operated under, a combination and conspiracy which was in restraint of trade and commerce among the several states and wrongfully and unlawfully conspired

with other persons to monopolize part of the trade and commerce among the several states, in violation of and contrary to the Sherman Anti-Trust Act of the United States (26 Stat. 309, 38 Stat. 731, 15 U. S. C., Secs. 1, 2, 7, 15) and did and performed acts forbidden by said Act. Plaintiffs are persons injured in their businesses and property by said acts of defendant by reason of the defendants doing said things forbidden by said Act. These conclusions of law are in accordance with the law as held by the decision of the Supreme Court of the United States heretofore made in the Mandeville case No. 4643 (334 U. S. 219), which decision is binding upon this court.

"4. Plaintiffs were injured and damaged in their businesses by reason of said matters forbidden in the anti-trust law in the following sums: . . ."

If these were in the findings, defendant would have no argument, but they were put in the Conclusions of Law at petitioner's own instance. [R. 242-3.] Petitioner, therefore, in effect, claims that the Court erred because the first two sentences of Conclusion 3 were not included under "Findings of Fact" instead of under "Conclusions of Law," and for such "error" petitioner contends the case must be reversed! That is what petitioner really means when it incorrectly states (p. 2) that "the District Court refused to make any finding of fact that the activities complained of had any effect on interstate commerce." What the Court actually did was to put that finding into the conclusions of law at the instance of

petitioner! [R. 242-3.] (The trial court was of the opinion during the trial that there had been a substantial effect upon interstate commerce [R. 318-9] and that all the allegations of the amended complaint, as amended, had been proved. [R. 729, *et seq.*])

There are several answers to petitioner's argument: (a) The words put into the conclusion of law are either conclusions of law or mixed findings and conclusions; (b) if they are findings of fact, then their efficacy as findings is not lost because placed under "Conclusions of Law"; (c) they were placed in the "Conclusions of Law" at the instance of petitioner and if that were error, it was error induced by petitioner, who cannot complain thereof; (d) petitioner made no attempt to have them placed in the Findings of Fact by a motion under Rule 59; and (e) petitioner is not prejudiced. Each is a complete answer to the cases cited by petitioner, none of which involves a "finding" put into the "Conclusions of Law" at an appellant's own request.

In petitioner's petition for rehearing before the Supreme Court in the previous decision, it states (emphasis added):

> "We also believe it proper to point out that the allegations which the court has deemed sufficient to keep sugar in the case were *all conclusions of the pleader. Cf., Glenn Coal Co. v. Dickinson Fuel Co.,* 4th Cir., 72 Fed. 2d 885, 887. They were directly attacked as such by motion addressed to the original complaint. . . . After the reference to the sugar was deleted from the charging paragraph, the motion for

a more definite statement was not renewed because, while the allegations to the same effect in the amended complaint still constituted *mere conclusions of the pleader,* they were meaningless as well as erroneous when applied to the beets alone. . . ."

A note at the foot of this page of that petition states:

"See, for instance, the allegation set forth in note 6, at p. 6 of the Opinion, which is correctly characterized as summarizing petitioner's *conclusions.*"

Note 6 is on page 7 of the Supplement hereto and specifically refers to Paragraph XIX of the amended complaint as summarizing "petitioners' *conclusions,*" to-wit:

"By reason of the foregoing acts of the defendant and its said conspirators, *interstate commerce in sugar was illegally restrained, competition therein was not only substantially lessened but was destroyed,* the price of sugar beets was illegally fixed, and an illegal monopoly was established, all in violation of the anti-trust laws of the United States, to the damage of plaintiffs as aforesaid."

The Supreme Court in the body of its decision also referred to these words as "legal as well as factual conclusions" [Supp. p. 5], and in note 24 stated that they "could have been elided without affecting the substance or validity of the remander of the amended complaint to state a cause of action under the Sherman Act." [Supp. p. 27.]

A Finding of Fact Is a Finding of Fact Even Though Included Under the Heading of "Conclusion of Law." No Substantial Rights of Defendant Were Affected.

It is not only "difficult to distinguish between 'Findings of Fact' and 'Conclusions of Law'" (*Grossman v. Grossman,* 52 Cal. App. 2d 184, 191), but "a scientific distinction between them is not workable." (5 *Moore's Federal Practice,* 2d Ed., p. 2643, Sec. 52.05(1).) For this reason and because "a court at every stage of a proceeding must disregard every error or fact in the proceeding which does not affect the substantial rights of the parties (Rule 61, Fed. Rules of Civ. Proc.), it is immaterial whether a finding of fact is found under the title "findings of fact" or the title "conclusions of law." In either case it is treated for all purposes as a finding of fact.[10]

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[10]*Continental Nat. Bank v. Nat. City Bank,* 69 F. 2d 312, 318 (cert. denied 293 U. S. 557); *Bogan v. Hynes,* 65 F. 2d 524, 526 (cert. denied 290 U. S. 690); *O'Keith v. Johnston,* 129 F. 2d 889, 890; *Walker v. Lightfoot,* 124 F. 2d 3, 5; *Compania v. Mexican Gulf Oil Co.* (2d Cir.), 292 Fed. 846; *Baldwin Rubber Co. v. Paine and Williams Co.* (6th Cir.), 99 F. 2d 1, 3; *Alger v. U. S.* (7th Cir.), 171 F. 2d 667, 668; *Lewis v. Ingram* (10th Cir.), 57 F. 2d 463, 466; *Minn. Mining & Mfg. Co. v. Coe* (C. of App. for D. C.), 125 F. 2d 198, 199, and the California Courts; *Lindberg v. Stanto,* 211 Cal. 771, 775; *Sessions v. Tott,* 220 Cal. 714, 718; *Johndrow v. Thomas,* 31 C. 2d 202, 205.

Under Rule 52-a the findings of the trial court are presumptively correct and should not be disturbed unless clearly erroneous. (*Sapp v. Gardner* (9th Cir.), 143 F. 2d 423, 425; *Milwaukee Towne Corp. v. Loew's, Inc.* (7th Cir.), 190 F. 2d 561, 564; *Paramount Pest Control v. Brewer* (9th Cir.), 177 F. 2d 563, 567.) Rule 52-a requires the appellate court "to give due weight not only to conclusions drawn by the trier of facts . . . but also to inferences . . ." (*U. S. v. Fotopulous* (9th Cir.), 180 F. 2d 631, 634.)

Rule 61 governs.[11] Defendant neither shows nor claims any prejudice or effect upon its substantial rights by reason of this alleged mistaken nomenclature and therefore presents no reversible error. (*Walker v. Lightfoot,* 124 F. 2d 3, 5; *O'Reilly v. Campbell,* 116 U. S. 418.) The last cited case states at page 421:

> "Fact and conclusions of law are sometimes mingled together contrary to the direction of the statute. . . . But findings are not to be construed with the strictness of special pleadings. It is sufficient if from them all, taken together with the pleadings, we can see enough upon a fair construction to justify the judgment of the court, notwithstanding their want of precision and the occasional intermixture of matters of fact and conclusions of law. Defects of form should be called to the attention of the trial court by the objecting party; and then requisite correction of the findings would seldom be denied."

In the case at bar not only did petitioner not seek correction by motion under Rule 59 or otherwise request the trial court that these words be made a finding and not a conclusion of law, but in its objections to the proposed findings it asked that they should be put in the conclusions of law! [R. 241 to 243.] Therefore, any error that occurred was error invited or caused by petitioner itself. A party inviting or causing error cannot on appeal complain of that error.[12]

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[11]Rule 61 applies to courts of appeal as well as to district courts. *Everett v. S. P. Co.* (9th Cir.), 181 F. 2d 58, 62; *Department v. Okonite* (9th Cir.), 181 F. 2d 375, 382.

[12]*U. S. v. Wurtsbaugh* (5th Cir.), 140 F. 2d 534 (first headnote); *Smails v. O'Malley* (8th Cir.), 127 F. 2d 419 (seventh headnote); *Mach v. Abbott Co.* (8th Cir.), 136 F. 2d 7 (third headnote); 3 *Am. Jur.,* p. 427, Sec. 876; 5 *Corp. Jur. Sec.,* pp. 173-4, Sec. 1501; see also, *N. Y. Elevated R. R. Co. v. Fifth Nat. Bank,* 135 U. S. 432; *Mercelis v. Wilson,* 235 U. S. 579.

The trial court followed petitioner's suggestion [R. 242-3] by putting the "finding" as to the effect on interstate commerce into the Conclusions of Law and petitioner now argues that the District Court eliminated findings as to that issue. That is a half-truth—they were eliminated from the findings but put into the conclusions at petitioner's own request!

At pages 13 and 14 petitioner states:

> "It will be recalled that in its prior opinion in this case (p. 235) this court laid down as one of the three requisites for the stating of a cause of action for treble damages under the Sherman Act the necessity of showing by allegations of the complaint that the activities complained of produced the forbidden effects upon commerce, *i. e.*, a substantial economic effect upon interstate commerce. (See *Wickard v. Filburn,* 317 U. S. 111, 125.) Such a showing is thus a material ingredient of a treble damage cause of action. It must both be pleaded and proved and the trial court must *find* as to this ingredient to warrant a recovery, for the question of interstate effect for a cause of fact basic to the plaintiff's right of recovery."

The statements are a combination of truth, half-truth, and untruth. Neither the prior opinion nor *Wickard v. Filburn* held that a plaintiff in a Sherman Act case must plead or that the Court must find as a finding of fact that the acts had "a substantial effect upon interstate commerce." Nowhere in the complaint that was before the Supreme Court on the prior appeal was there an allegation that the activities had "a substantial economic effect upon

interstate commerce." Nowhere was there such a specific allegation in *Wickard v. Filburn*. That case involved a small farm that had been allocated 11.1 acres of wheat but had planted 23 acres and raised 239 bushels in excess of its allotment. Part was sold, part was fed to the poultry and livestock on the ranch, part was ground into flour by the farmer and a part was held for seed.) The Supreme Court held *as a conclusion of law* in the *Wickhard* case that there was present the required effect upon interstate commerce. Likewise, in its former opinion in this case the Supreme Court held that if the allegations of fact of the amended complaint before it were true, the required effect on interstate commerce was present. The trial court has found that they were true.

The Supreme Court did not hold in the *Wickard* case, or in any other case cited by petitioner, that there must be a finding of fact in specific words that the activities complained of had "a substantial, economic effect upon interstate commerce." Petitioner, in note 13, page 14, cites the opinion of Mr. Justice Black in *Polish National Alliance v. N. L. R. B.*, 322 U. S. 643, 652. ***That case holds exactly the opposite of what petitioner cites it for and is a complete approval of what the trial judge did in this case.***

Justice Black there stated at pages 651, 652 (emphasis added):

> "The Board did not exercise jurisdiction and enter its order on a fact finding that petitioner's insurance activities merely affected commerce in types of inter-

state business other than its own. *On this fact issue it made no finding at all.* Its finding was that the petitioner, being 'engaged in the business' was 'engaged in commerce within the meaning of the Act.' This ultimate finding of fact rested on detailed subordinate findings which revealed the widespread interstate activities of the petitioner in carrying on its insurance business. As the Court's opinion points out, these insurance activities involved a 'steady stream, into and out of Illinois, of bills, notices, and policies, the payments of commissions, the making of loans on policies, the insertion and circulation of advertising material in newspapers, and its dissemination over the radio.' Only on the basis of the ultimate finding that petitioner was itself 'engaged in commerce' did the Board make the essential further finding that petitioner's refusal to bargain collectively with its employees had a 'close, intimate, and substantial relation to commerce among the several states' and tended 'to lead to labor disputes burdening and obstructing commerce.'

"As a conclusion of law the Board stated that petitioner's unfair labor practices constituted 'unfair labor practices affecting commerce, within the meaning of §2(6) and (7) of the Act.' Section 2(6) defines the term 'commerce' to mean 'trade, traffic . . .;' and §2(7) defines the term 'affecting commerce' to mean either 'in commerce' or 'burdening or obstructing commerce.' 49 Stat. 449, 450, c. 372, 29 U. S. C. A. §152(6) and (7), 9 F. C. A. title 29, §152(6) and (7). From the language of these definitions, and the Board's findings above described,

> it is apparent that the Board's *conclusions of law that 'commerce' was 'affected' by petitioner's unfair labor practices rested upon its previous conclusion of fact that petitioner's insurance business was engaged in commerce.* The Board *concluded* that, since the insurance business itself was engaged in commerce, petitioner's refusal to bargain, and the strike thereby provoked, would affect commerce."

This is exactly what happened in the case at bar. The trial court found as a fact that the petitioner was engaged in interstate commerce, and had done certain things; and then, as a conclusion of law, the trial court found that petitioners

> "wrongfully and unlawfully entered into and . . . remained and operated under a combination and conspiracy which was in restraint of trade and commerce among the several states and wrongfully conspired with other persons to monopolize part of the trade and commerce among the several states in violation of and contrary to the Sherman Anti-Trust Act . . . and did and performed acts forbidden by said act. Plaintiffs are persons injured in their businesses and property by said acts of defendants by reason of the defendants doing said things forbidden by said act."

The very thing that petitioner complains of in the case at bar (*i. e.,* making a conclusion of law instead of a finding of fact) is exactly what the Supreme Court approved in the Polish National Alliance case! Petitioner cites other cases but none supports its position.

The Undisputed Evidence Was Not (as Claimed by Petitioner) That the Admitted Monopoly and Restraint of Trade "Had No Effect Whatever Upon the Price Supply or Competitive Conditions as to Sugar." The Evidence Did Show Such Effect.

The Supreme Court declared that "even if it is assumed that the final sum of the conspiracy was control of the local sugar beet market, it does not follow that it is outside the scope of the Sherman Act," and declared that the entire allegation of Paragraph IX of the amended complaint "could have been elided without affecting the substance or validity of the remainder of the amended complaint to state a cause of action under the Sherman Act. There was more than enough without it." The Supreme Court also said:

> "But under the facts characterizing this industry's operation" (all of which the trial court found to be true in Findings 3b, 5, 6, 7, 18, Supp. pp. 33-38, 44-45), "and the tightening of controls in this producing area by the new agreements and understandings" (which the trial court found to exist in Findings 8 to 17, Supp. pp. 38-44), *"there can be no question that their restrictive consequences were projected substantially into the interstate distribution of the sugar. . . . Indeed they permeated the entire structure of the industry in all its phases, intrastate and interstate."*

It also said:

> "Moreover it is *inconceivable* that the monopoly so created" by the admitted combination or conspiracy (petitioner takes no exception to the finding of the conspiracy to restrain trade) "will have no effects for the lessening of competition in the later interstate

phases of the over-all activity or that the effects in those phases will have no repercussions upon the prior ones, including the price received by the growers."

It also said:

'The idea that stabilization of prices paid for the only raw material consumed in an industry has no influence toward reducing competition in the distribution of the finished product, in an integrated industry such as this, is impossible to accept."

It also stated:

"In sum, the restraint and its monopolistic effects were reflected throughout each state of the industry permeating the entire structure. *This was the necessary and inevitable effect of the agreement* among the refiners to pay uniform prices for beets, in the circumstances of the case."

Petitioner still denies what the Supreme Court has declared was "the necessary and inevitable effect of the agreement" and as to which "there can be no question," and argues for what the Supreme Court has decided was "inconceivable" and "impossible to accept."

The trial court found that during the conspiracy the conspirators who controlled all of the sugar refineries in Northern California

"no longer competed with the others but instead and regardless of the efficiency or lack of efficiency of the sales or manufacturing organizations of any of the conspirators and regardless of the price at which sugar was sold from any particular refinery . . . paid the same price for the same beets of the same sugar content; did not pay the growers a reasonable price for their beets; sold seeds to, entered into con-

> tracts with and bought beets only from growers who signed the standard printed form of contract prepared by them and practically identical in material terms, so that farmers either signed such a contract or could not get seeds to plant sugar beets or a practical market to sell their marketable beets." [Supp. pp. 39, 40; Finding 9.]

It found that prior to the 1939 crop season the various manufacturers of sugar in northern California, including petitioner,

> "competed in interstate commerce with each other as to the performance, ability and efficiency of their manufacturing, sales and executive departments and each strove to increase sales returns and decrease sales expenses and to operate as efficiently as possible in order to increase the unit return to growers of sugar beets under said standard contract and thus to attract beet growers to sign contracts with them" [Finding 10; Supp. pp. 40-1], but that during the crop seasons of 1939, 1940 and 1941 "as a direct result of said conspiracy, expected and planned by said conspirators, there was no longer competition between the conspirators as had previously existed in their purchase of sugar beets" [Finding 11; Supp. 41] and that "as a direct, expected, and planned result of said conspiracy, the free and natural flow in the purchase of sugar beets was intentionally hindered and obstructed. *As a further direct, expected, and planned result of said conspiracy, said three manufacturers operated, in so far as the growers' returns were concerned, as if they were one corporation owning and controlling all sugar factories in northern California but with three completely separate overheads and selling expenses.*" [Finding 12; Supp. p. 41.]

Grower's returns which the Court referred to, were determined by the sale of sugar (not sugar beets) in interstate commerce! This finding alone answers defendant's argument.

The Court further found

> "that the reasonable prices for the sugar beets delivered by the plaintiffs to petitioner . . . were . . . for . . . 1939, $15,749.51 more than Mandeville received . . .; for . . . 1940 . . . $14,321.61 more than Mandeville received . . . ; for . . . 1941, . . . $3,528.00 more than Zuckerman received, . . ., and $1,100.00 more than Evans received . . ." [Finding 18C; Supp. p. 45.]

Petitioner makes no objection to any of these findings. They sustain the judgment. So does the evidence which petitioner ignores.

The Purposes of the Conspiracy.

During the trial, the following occurred [R. 398-9]:

> "The Court: Is there going to be any direct evidence from either side in this case as to the whys and wherefores of the change from the 1938 basis to the form of contract in question in this suit? . . .
>
> The Court: . . . Is there going to be a question of inferences, or is there going to be somebody that is going to testify as to why they did it? . . . What I am naturally interested in is the motive behind the change-over . . .
>
> The Court: One of the things I am interested is when you changed your form of contract, your method

of figuring prices, there must have been a reason for it, some economic reason I assume. Is there any direct evidence as to why the change was made in the method of doing business?"

Later that day [R. 401]:

"Mr. Works: I don't think we answered one question which your Honor asked before the adjournment. That is the reason as to why these things were done. We shall have evidence along that line, your Honor."

But they did not produce any such evidence. The Court again raised the same question:

"They have come into court and recognized that they had a meeting and agreed on this contract. But the thing you haven't developed is why they made the change." [R. 452.] ". . . It is also true that they abandoned it. I don't know why." [R. 453.]

Two explanations are in the record as to why it was adopted but none as to why it was abandoned. One was in the deposition of President Wilds of Crystal, and the other in the deposition of Mr. Zitkowski, Vice-President and General Manager, both read in evidence.

The President explained [R. 473-4]:[13]

"Here is the situation: I do not feel that the beet industry has any apologies to make to anyone for settling on a joint net basis, even though it may be

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[13]The request of the Trial Court for this explanation demonstrates that the District Judge did not hold, as petitioner claims, that the Supreme Court decision dispensed with proof. If the Judge had so held, he would not have been interested in finding out the reasons for the change from the single net to the joint net and for its later abandonment.

a joint net with other companies. I say that for the reason that, in order to stabilize the industry, a joint net is the preferable way to settle with your growers, not only from the growers' standpoint, but from the processors' standpoint. I may turn that around, not only from the processors' standpoint but from the growers' standpoint. As an illustration, we have a plant at Clarksburg that is capable of slicing beets say, from 15,000 acres. From time to time, there are 100,000 to 150,000 acres of beets grown in that area. Now, suppose, just for the purpose of illustrating, Crystal nets $6.00 per for its sugar, and Holly and Spreckels net $5.50, the following season all of the growers would want to grow for Crystal because we netted the most. We can't take all those beets, there is only a certain quantity we can process. When we turn down these growers of Holly and Spreckels when they come to us and want us to take their contracts, they say, 'Well, to hell with beets; I am not going to grow beets any more. If my neighbor across the road gets more for his beets than I do for mine, I am not going to grow any more beets,' with the result the entire industry suffers. That can be reversed. Maybe next year Holly nets $6.00, and Crystal and Spreckels net $5.50. It keeps the industry in a turmoil constantly without getting any more for the growers or for the processors."

The explanation of Zitkowski (Vice-President and General Manager) was contained in a letter dated November 6, 1930, from Zitkowski to Lester J. Holmes, Manager of Crystal's Clarksburg plant, which stated [R. 758-759]:

"Concerning the first objection, which refers to an average net selling price for the sugar produced in Northern California, I think you yourself understand the principles behind this very thoroughly. The prin-

> cipal objective therein is to attain, as far as this is possible, a higher average net receipt for sugar by avoiding, as much as possible, cut-throat competition, crosshaul of sugar, and other similar practices, all of which tend to depress the receipts for sugar and benefit principally the transportation companies and some of the dealers in sugar to the detriment of perhaps both the customer and the grower of beets, as well as, of course, the processor of such beets."

Zitkowski wrote this letter "to allay Mr. Holmes' own fears or objections" to the plan. [R. 386.] He testified that "the cut-throat competition" referred to by him was "stealing one another's customers . . . purchasers of sugar" [R. 385-386]; that the "cross-haul of sugar" referred to hauling of sugar by the three companies over routes that crossed each other; and that some of the sugar dealers who bought the sugar from the refiners were getting special concessions below the market and one of the purposes of the plan was to stop such practices. [R. 386.] (This should satisfy petitioner's insistence that purchasers of sugar must be affected unless petitioner now claims that the Sherman Act protects only retail and not wholesale purchasers!)

Zitkowski, on September 19, 1938, sent Holmes a copy of the 1939 conspiracy contract and wrote:

> "We should confine ourself to our district and our growers. In other words, we should proceed on the assumption that we will not take other company growers." [R. 751, 408.]

Mr. Holmes received no instructions thereafter to the contrary. [R. 408.] But as soon as the conspiracy was over Holly and Crystal offered bonuses to growers. [Ex. 39, R. 515-6; Stip. R. 522.] Competition had started!

Merely changing from a single to a joint return would not have avoided cut-throat competition of the companies in stealing each other's sugar customers, would not have prevented sugar dealers from getting reduced prices, nor would have avoided practices which benefited principally the transportation companies and some of the dealers in sugar. Therefore, the conspiracy must have been intended to be more than a mere agreement to adopt the joint return. It must also have been an agreement (as Zitkowski stated), for (1) "avoiding cut-throat competition"; (2) "avoiding cross-haul of sugar"; (3) "avoiding similar practices, all of which tend to depress the receipts from sugar and benefit principally the transportation companies and some of the dealers in sugar"; (4) to benefit *"of course"* the processor and *"perhaps* both the customer and the *grower of beets."*

If this were not so, the person or persons who made and carried out the conspiracy on behalf of petitioner could have so testified—but no such person was produced by Crystal!

The answer to Interrogatory 87 [R. 780] admitted that the change from the single return system of 1938 to the joint return system of 1939-40-41 "was made with consultation, discussion or conference by Crystal with the other manufacturers of sugar in California north of the 36th parallel." [R. 364.] Who consulted on behalf of Crystal and with whom? Where and when? What was said? What was the purpose of the consultation? Why was the plan adopted? Petitioner alone knew the answers.

Petitioner did not produce at the trial Wilds (President), Boetcher (Chairman of the Board), Zitkowski (Vice-President and General Manager when the conspiracy took place) or any one who took part in the nego-

tiations or who carried into effect the conspiracy and offered no explanation for such absence. They only produced and now cite witnesses who knew nothing about the negotiations or the reasons for the change.

Respondents took the depositions of nine of petitioner's officers, in an endeavor to ascertain who had the conspiracy meetings with the other Northern California refiners. (The only officer whose deposition was not taken was the Chairman of the Board, who was then in Europe.) Each denied he was present at any such meeting.[14]

Holmes was the contact man between the company and the growers in Northern California. [R. 407-8.] He reported to the head office "there was a growing demand among the growers with whom Crystal dealt in Northern California that the companies pay on the individual sales net rather than on the net of all factories" [R. 409]; that "there was a general feeling among the growers that the agreement providing for net selling price based upon the average of the three companies was wrong in principle and should be stricken out" [R. 414]; that the growers "were rather outspoken in their condemnation of the provisions of net selling price based upon the average of the three companies." [R. 414.] On September 27, 1940, the growers in Northern California were still objecting to a net sales price based on the average of the three companies" [R. 416], but the conspiracy persisted.

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[14]Hardy, R. 423; Merrill, R. 451; Graham, R. 456; Kraybill, R. 495; Sumerton, R. 497; Holmes, R. 669-670; Hayden, R. 499, and 695-696. Zitkowski (Vice-President and General Manager) and Wilds (President) admitted knowledge of the plan but each denied being present [R. 393-395, 471-472, 473].

When a Sherman Act Defendant Fails to Produce Evidence Which Is Within His Control, the Court Will Presume That the Evidence, If It Had Been Produced, Would Have Been Adverse.

Interstate Circuit v. United States (1939), 306 U. S. 208, was a Sherman Act case. Conferences had been had between the appellant-distributors at which each was represented. None of these representatives was called as a witness. The Supreme Court stated at pages 225 and 226 of its opinion (emphasis added):

> "This inference was supported and strengthened when the distributors, with like unanimity, failed to tender the testimony, at their command, of any officer or agent of a distributor who knew, or was in a position to know, whether in fact an agreement had been reached among them for concerted action. When the proof supported, as we think it did, the inference of such concert, the burden rested on appellants of going forward with the evidence to explain away or contradict it. They undertook to carry that burden by calling upon local managers of the distributors to testify that they had acted independently of the other distributors, and that they did not have conferences with or reach agreements with the other distributors or their representatives. *The failure under the circumstances to call as witnesses those officers who did have authority to act for the distributors and who were in a position to know whether they had acted in pursuance of agreement is itself persuasive that their testimony, if given, would have been unfavorable to appellants. The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been*

> *adverse. Clifton v. United States,* 4 How. 242, 247, 11 L. ed. 957, 959. *Silence then becomes evidence of the most convincing character."*[15]

This is exactly what petitioner did here—it called subordinate officers who had nothing to do with making or carrying out the agreement between Holly and Spreckels but did not call those who did. This failure to call those who knew is "evidence of the most convincing character."

The Petitioner Offered No Satisfactory Explanation of the Change From Single Return to Joint Return. Inferences Must Be Drawn Therefrom That Support the Judgment.

The Court, as we pointed out, asked early in the case why the change was made from the single to the joint return. [R. 397.] The Court later said [R. 731, 732] (emphasis added):

> "I realize there has been considerable testimony here from officers of the company, *but I haven't found any explanation, at least a satisfactory explanation, for their change of method.*
>
> I read the president's explanation in the depositions during the noon hour. If I recall correctly, his explanation was that it was to keep the growers from switching around from place to place: In other words, keep a stabilized group of growers which they could depend upon as a source of beets. Now, that was stifling competition. That kind of an agreement, you can't get away from it, is stifling competition.

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[15]The same rule is set forth in: *Shull, et al. v. London Amusement Co.,* 123 F. 2d 302, 306; *Goldie v. Cox,* 130 F. 2d 695, 719; *Miner, Inc. v. Peerless Equipment Co.,* 115 F. 2d 650, 655; *William Goldman Theatres v. Loew's, Inc.,* 150 F. 2d 738, 743.

As a practical matter, the grower might have a choice of where he wanted to sell. Mr. Holmes testified that he might like some foreman or some superintendent of a plant better than another, but as far as the price is concerned, there was no advantage in switching around.

Mr. Works: I don't think I am at great variance with what your Honor says.

The Court: Then if they stifled competition, it was an advantage, the change, because they brought it about, the refiners, they adopted the change of method here. Probably they found it working successfully in other places and thought they would try it here. But it was an advantage to them to change that contract, and if it was an advantage to them, to the refiners, then it would have to be at the expense of the growers."

We submit that under the doctrine of *Interstate Circuit v. U. S.* (306 U. S. 208), the inference that must be drawn from the Zitkowski letter and the failure of defendants to produce the officers who entered into and carried out the conspiracy is that the agreement or understanding between Spreckels, Holly and Crystal was not only one to use a joint return contract but also one that provided: (a) None would take the others' growers; (b) none of them would take the others' sugar customers; (c) cut-throat competition between them as to sales practices would cease; (d) cut-throat competition between them as to securing growers would cease; (e) sales would be so arranged as to avoid cross-haul of sugar; (f) sales would be so arranged that transportation companies and buyers of sugar would no longer get advantages from competition; (g) the advantages to the companies would be at the expense of the growers.

The Inferences We Have Drawn Were Declared by the Supreme Court to Have Been "the Necessary and Inevitable Effect of the Agreement" and That Any Other Result Would Be "Inconceivable."

The Supreme Court decision, after pointing out that before the conspiracy "a tighter or more all-inclusive monopolistic position hardly can be conceived," went on to say:

> "When therefore the refiners cease entirely to compete with each other in all stages of the industry prior to marketing the sugar, the last vestige of local competition is removed and with it the only competitive opportunity for the grower to market his produce. Moreover it is inconceivable that the monopoly so created will have no effects for the lessening of competition in the later interstate phases of the over-all activity or that the effects in those phases will have no repercussions upon the prior ones, including the price received by the growers.
>
> "There were indeed two distinct effects flowing from the agreement for paying uniform growers' prices, one immediately upon the price received by the grower rendering it devoid of all competitive influence in amount; the other, the necessary and inevitable effect of that agreement, in the setting of the industry as a whole, to reduce competition in the interstate distribution of sugar.
>
> "The idea that stabilization of prices paid for the only raw material consumed in an industry has no influence toward reducing competition in the distribution of the finished product, in an integrated industry such as this, is impossible to accept. By their agreement the combination of refiners acquired not only a monopoly of the raw material but also and thereby control of the quantity of sugar manufac-

tured, sold and shipped interstate from the northern California producing area."

We emphasize "Moreover it is inconceivable that the monopoly so created" (in the price paid growers) "will have no effect for the lessening of competition in the later interstate phases of the over-all activity" (*i. e.,* in the marketing and sale of the sugar) "or that the effects in these phases will have no repercussions upon the prior ones, including the price received by the growers."

(The evidence clearly shows the effect on the price paid the grower. During the first two years of the conspiracy, as we will show, the price paid the growers decreased while Crystal's profit zoomed; during the third year of the conspiracy, Crystal's profits increased many, many times faster than the price paid the farmer; but the first year after the conspiracy ended, Crystal's profits dropped and the growers' returns increased! As the Supreme Court said, it would be "inconceivable" that the conspiracy did not have "repercussions" upon "the price received by the growers." We will show just what those "repercussions" were in dollars and cents—and they sustain the award of damages.)

We also emphasize the statement that "the necessary and inevitable effect of the agreement" was "to reduce competition in the interstate distribution of sugar." It was not a mere possible or probable result but a "necessary and inevitable effect." That was just what the Zitkowski-Holmes letter and Zitkowski's testimony set forth as to the purpose of the plan, *i. e.,* avoiding cut-throat competition upon sugar purchases, avoiding cross-haul of sugar, avoiding stealing one another's sugar customers, avoiding special price allowances to sugar dealers, etc.

The Supreme Court said: "in substance and roughly, if not precisely, they allocated themselves the market for California beets." This is *precisely* what they did. At the very time that Zitkowski sent Holmes for the first time a copy of the 1939 joint return contract, he wrote Holmes: ". . . we should proceed on the assumption that we will not take other companies' growers." No instructions to the contrary were thereafter received by Holmes. [R. 408.] But as soon as the conspiracy ceased Holly and Crystal offered bonuses to the growers to sign up. [R. 515-6; Ex. C; R. 522.]

Bearing in Mind the Purposes of the Conspiracy and That, as the Trial Court Pointed Out, if It Was an Advantage to the Refiners to Change the Contract (From a Single Return to a Joint Return), That It Would Have to Be at the Expense of the Grower, We Can Ascertain the Effect.

The contracts with the growers were referred to as the 50-50 contracts [R. 406], because the formulas were based upon a plan whereby the grower and the company were each supposed to receive approximately 50% of the net return from the sale of sugar produced from the beets. [R. 375, 405.] This method was used from 1938 through 1942, the only difference being that in 1938 and 1942 (no conspiracy) the formula used the average net return secured by Crystal alone from the sale of Clarksburg sugar, while in 1939, 1940 and 1941 (conspiracy), the formula used the average net return from the three companies.

During the conspiracy the three companies used a joint return method of paying the growers. No longer did they compete with each other for growers—not only was

there no incentive for a grower to change but the companies would not take each others growers. [R. 408.] They no longer had cut-throat competition of sugar buyers or stealing of each others sugar customers and other similar practices. They competed for neither growers of beets nor buyers of sugar. [*Cf.* the Zitkowski letter.] The industry was what Mr. Wilds called "stabilized!" [R. 474.] As the trial court found, the conspirators "operated as if they were one corporation, owning and controlling all sugar beet factories in Northern California but with three completely separate overhead and selling expenses." [Supp. p. 41.]

The trial court, in commenting upon the statement of President Wilds, said, as we have pointed out, regarding the change from the single to the joint return:

> "But it was an advantage to them to change that contract, and if it was an advantage to them, to the refiners, then it would have to be at the expense of the growers."

Therefore, bearing in mind the 50-50 method of paying growers, *we can determine just what the company made during the conspiracy in excess of what it made before the conspiracy and contrast the result with what the growers received during the conspiracy as compared with what they received prior to the conspiracy.*

If the return to the growers during the conspiracy increased at the same rate as the profits to the company during the same period, it might be argued that the grower suffered no damage—but if the profits to the company tremendously increased during the conspiracy while the returns to the grower either decreased or increased in a

much smaller percentage, then the damage to the grower would be evident.

The evidence shows this most clearly. The books of Crystal were kept on a fiscal year running from April 1st to March 31st. The crop year 1938 ran from August 1, 1938, to July 31, 1939. The nearest fiscal year to that crop year was the fiscal year 1938-39, which ran from April 1, 1938, to May 1, 1939. The crop year 1938, therefore, included 8 months of the fiscal year 1938-39 (August 1, 1938, to March 31, 1939), and 4 months of the fiscal year 1939-40 (April 1, 1939, to July 31, 1939). The crop year 1938 covered eight-twelfths or two-thirds of the fiscal year 1938-39 and four-twelfths or one-third of the fiscal year 1939-40. The crop year 1939 covered two-thirds of the fiscal year 1939-40 and one-third of the fiscal year 1940-41. The crop year 1940 covered two-thirds of the fiscal year 1940-41 and one-third of the fiscal year 1941-42. The crop year 1941 covered two-thirds of the fiscal year 1941-42 and one-third of the fiscal year 1942-43.

In view of this situation there are two methods of comparing the effect of the conspiracy upon the return to the growers and upon the profits to the company—one is to compare the return to the grower for the crop year with the profits made by the company for the nearest fiscal year, *i. e.,* to compare the crop year 1938 (August 1, 1938, to July 31, 1939) with the fiscal year 1938-39 (April 1, 1938, to March 31, 1939) and the other is take two-thirds of the profits for the fiscal year 1938-39, representing the 9 months from August 1, 1938 (the start of the crop year) to March 31, 1939, and one-third of the profits for the fiscal year 1939-40 representing the 3 months from

April 1, 1939, to July 31, 1940 (the end of the crop year) and then to add these together to get the profits of the crop year.

In our Supplement (commencing page 53), we set forth the detailed calculations. Summarizing these figures and comparing the increase and decrease of the 1939, 1940 and 1941 fiscal year profits to the 1938 fiscal year profits and the 1939, 1940 and 1941 Crystal net returns (as used as a part of the joint returns to pay Clarksburg growers) to the 1938 Crystal net returns:

	Increase or decrease in profits of the company over 1938	Increase or decrease in net returns as used as part of formula in paying growers over 1938
1939-40	up 146%	down 4.3%
1940-41	up 213%	down 4 %
1941-42	up 490%	up 24 %

Comparing 1939 (year before the conspiracy) with each year during the conspiracy:

(a) The profits of the company went up tremendously (146% and 213%), while the return basis to growers went down in 1939 and 1940 (the first 2 years of the conspiracy).

(b) The profits of the company went up in 1941 over 1938, almost 5 times, while the return basis to growers went up less than one-fourth.

As soon as the conspiracy was over, the profits to the company decreased 27% from the previous year, while net return basis to growers in Clarksburg district increased almost 7% in the same periods.

Summarizing the figures and comparing the increase and decrease of the 1938, 1939, 1940 and 1941 crop year profits (determined on the two-thirds-one-third method) with the 1938, 1939, 1940 and 1941 Crystal net return basis to Clarksburg growers (as used as a part of the joint returns to pay growers):

	Increase or decrease in profits of Crystal as compared with 1938 profit	Increase or decrease in net return of Crystal as used as part of formula in paying growers as compared with 1938
1939	Increase 80.54%	Decrease 5.3%
1940	Increase 172.2 %	Decrease 4.0%
1941	Increase 260.30%	Increase 20.7%

Comparing the crop year 1938 (the year before the conspiracy) with each year during the conspiracy:

(a) Profits of the company went up tremendously (80.54% and 172.2%), while the return on which the growers were paid went down in crop years 1939 and 1940 (the first 2 years of the conspiracy).

(b) The profits of the company went up in 1941 over 1938 over 2½ times, while the net return which was a part of this formula increased only one-fifth.

As soon as the conspiracy was over, the profits of the company *decreased* 20.7%, while the net return used as the basis of paying the growers increased for the same period 6.9%.

Crystal and the Growers were operating under a 50-50 basis, "in the same boat," as petitioner's counsel put it. In 1938 and 1942 crop years there was no conspiracy. In 1939, 1940 and 1941 there was. During the con-

spiracy the profits of Crystal rose in huge amounts, while the growers' returns decreased the first two years and rose only slightly the third. Then, as soon as the conspiracy was over, the profits of the company decreased, while the return to the growers increased!

This situation was the direct result of the conspiracy because, as the trial court pointed out—"if it (the change from single to joint return) was an advantage to them, to the refiners, it would have to be at the expense of the growers." The Court saw this result and the figures (taken from Crystal's own books) prove it. This result is what the Supreme Court in this case said was "necessary and inevitable."

If there were another reason for these results, it would have been easy for the executive officers of Crystal who made and carried out the deal to present it. The trial court asked for an explanation of the change in contracts—but it was not forthcoming. The Court asked for "live witnesses" to tell about the meeting between the three conspirators but the defendant produced none—and it alone could produce them. It brought various witnesses from Denver but not the ones who could answer the Court's question—only those who knew nothing.

This is not the first time that officers of a corporation charged under the Sherman Act have not taken the stand and "the failure" of petitioner "to call as witnesses those officers who did have authority to act and who were in a position to know . . . is itself persuasive that their testimony, if given, would have been unfavorable" to petitioner. Their silence was "evidence of the most convincing character." (*Interstate Circuit v. U. S.*, 306 U. S. 208, 226, *supra.*)

In view of these figures, the 50-50 nature of the deal with the growers, and the failure to take the stand of the petitioner's officers who made the agreements with Holly and Spreckels, it is evident that the Court must conclude that the gain to Crystal by reason of the conspiracy was as hereinafter set forth. Such conclusions are, in the words of the Supreme Court, "necessary and inevitable."

(a) For the crop year 1939 (when there was a conspiracy), the return to the growers decreased 5.3% from 1938 when there was no conspiracy. If profits had decreased from the 1938 profits of $882,802.58 by the same ratio as the net return, the profits for the crop year 1939 would have been $836,814.04 instead of being $1,593,897.27. Therefore, Crystal gained the difference or $757,883.23 as a result of the conspiracy in the 1939 crop season alone. This conclusion is "necessary and inevitable."

(b) For the crop year 1940 (during the conspiracy) the return to the growers decreased 4% from 1938 when there was no conspiracy. If the profits had decreased from the 1938 profits of $882,802.58 the same per cent as the net return, the profits for the crop year 1940 would have been $847,490.54 instead of $2,403,247.63. Therefore, Crystal gained the difference or $1,556,257.09 as a result of the conspiracy in the 1940 crop season. This conclusion is "necessary and inevitable."

(c) For the crop year 1941 (during the conspiracy) the return to the grower increased 20.4% from 1938 when there was no conspiracy. If the profits of Crystal had increased from 1938 profits of $882,802.58 in the same per cent as the net returns, the profits would have been $1,062,894.31 instead of $3,180,805.39. Therefore, Crystal gained the difference or $2,117,911.08 in the 1941 crop

season as a result of the conspiracy. This conclusion is "necessary and inevitable."

Northern California was the only Crystal district during 1939-40-41 in which it changed from a single to a joint return, and in which competition was replaced by restraint of trade and monopoly. World conditions affected each of Crystal's beet areas the same during 1939-40-41. Therefore, the only reason presented by the evidence for these gains to Crystal in the 1939-40-41 crop seasons was the conspiracy in Northern California. Crystal gained over 1938 as we have shown, (a) $757,883.23 in the crop year 1939; (b) $1,556,250.00 in 1940; (c) $2,117,911.08 in 1941. The Clarksburg growers under the 50-50 arrangement should have had one-half of such gains. But they did not get them. Therefore, the Clarksburg growers were damaged to the extent of one-half of these amounts, or (a) in the crop year 1939, $378,941.61; (b) in 1940, $778,128.54; (c) in 1941, $1,058,955.54.

In 1939 the Clarksburg District beets of defendant totaled 293,131 tons. Mandeville delivered 22,356.6 tons or 7.62%. In 1940 the total was 296,253 tons. Mandeville delivered 25,430.3 tons or 8.24%. In 1941 the total was 244,897 tons. Zuckerman delivered 14,144.7 tons or 5.77% and Evans, 4,401.7 tons or 1.79%.

Applying these percentages to the total gains of Crystal (and corresponding loss to Clarksburg growers) because of the conspiracy, we get these results; in 1939 Mandeville was damaged 7.62% of $378,941.62, or $28,875.35; in 1940 Mandeville was damaged 8.24% of $778,128.54, or $64,117.79; in 1941 Zuckerman was damaged 5.77% of $1,058,955.54, or $61,101.74; in 1941 Evans was damaged 1.79% of $1,058,955.54, or $18,955.31.

Such are the damages that the plaintiffs herein suffered. This conclusion is "necessary and inevitable." But the trial court was (using his own words) "conservative" in determining damages. [R. 227, 266-7.] Not only do these figures show damages but they show the effect of the conspiracy on the overall Interstate Commerce picture.[16]

During the conspiracy years sugar was sold in the United States on the multiple base point system condemned by the Supreme Court in *Federal Trade Commission v. Cement Institute,* 333 U. S. 683, as a violation of the Sherman Act. Various seaboard cities were the base points—New York, New Orleans, Boston, Philadelphia, Sugarland (Texas) and San Francisco. [R. 432-698.] The bases used were the ports at which cane sugar arrived from Cuba and Hawaii. [R. 432.] San Francisco was the only Pacific Coast base point. [R. 431.] Under this system, sugar was sold at the nearest base point, plus freight from there to point of destination. Clarksburg sugar, therefore, would be sold at San Francisco base price, plus freight from San Francisco [R. 434], unless the sugar was shipped to a destination which had a freight cost from another base point less than that from San Francisco. This base point system resulted in freight "absorption" and in "phantom" freight. If, for example, Southern California sugar was sold in Southern California, it was sold at San Francisco base price plus freight from San Francisco, so that the company would collect for freight that it never paid. This was phantom freight. But if California sugar was shipped to Texas, it would

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[16]This is but one method of showing damages. We show four others under a later heading.

be sold at Texas seaboard price so that the company would pay (absorb) the freight from Clarksburg to Texas [R. 698] and since freight costs were part of the expenses in arriving at the net return under the 50-50 contracts, the grower paid one-half of that absorption. [See letter of Holmes to Zitkowski, R. 746-7.] When California sugar was shipped to Chicago the company absorbed the difference between the freight from San Francisco to Chicago and the lesser freight rate from New Orleans to Chicago. [R. 698.]

An important element in determining the net return to the grower was the amount of freight on the sugar and that was determined by the amount of freight absorption and that in turn by the extent of shipment of California sugar to Texas, Chicago and other points where there was a freight absorption. The extent of such shipments of California sugar was determined, as we will show, by President Wilds but he was not called as a witness by petitioner.

Here are the actual freight costs:

	1938	1939	1940	1941	1942
Crystal	.1912	.438	.387	.322	.257
Holly	.329	.328	.488	.352	.373
Spreckels	.5379	.5409	.4749	.3618	.3741

Each of the three companies operated in Northern California and must have been affected substantially alike by bumper crops,[17] panic buying, hoarding, rationing, curtail-

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[17]Evans testified that the 1939 crop was "a little below average and that he had never had a bumper crop" [R. 614-615]; Clarksburg sales were less in 1939 than in 1938 [Ex. C]. In view of this evidence, petitioner cannot rely on any claim of bumper crop.

ment, release of restrictions, Pearl Harbor, and the other elements referred to by petitioner's witnesses. (There is no evidence that the three companies were not affected equally.) Yet these figures show:

1. In 1939 (the first year of the conspiracy), the freight costs of Holly and Spreckels were practically the same as in 1938 (no conspiracy), while Crystal's more than doubled, despite the fact that its deliveries of sugar dropped. [Ex. C, R. 720.] Crystal's freight costs in 1939 (conspiracy) were .438 as compared with .1912 in 1938 (no conspiracy) while Holly's changed from .329 to .328 and Spreckels' from .5379 to .5409. Holly's freight costs varied in these two years less than one-third of one per cent while Spreckels' varied less than 1%, but Crystal's increased by 128%!

2. In 1938, before the conspiracy, the freight costs of the three companies greatly varied: Crystal, .1912; Holly, .329; Spreckels, .5379; but during the three years of the conspiracy, the costs came closer together each year until during the last year of the conspiracy, 1941, they were very close together, as follows: Crystal, .322; Holly, .352; Spreckels, .3618. The difference between Crystal's freight costs and Spreckels' in 1938 was .3467 but in 1941 the difference was only .0398.

3. Then when the conspiracy was over and competition was restored, the opposite result occurred. Crystal's freight costs *decreased* from .322 in 1941 to .257 in 1942, or a decrease of 20%, while the freight costs of both Holly and Spreckels increased during the same period. Holly's *increased* from .352 in 1941 to .373 in 1942 or an *increase* of about 6%, while Spreckels' *increased* from .3618 in 1941 to .3741 in 1942 or about 3%.

Petitioner did not produce the officers who entered into and carried out the conspiracy. That failure and these figures "become evidence of the most convincing character" (*Interstate Circuit v. U. S.*, 306 U. S. 208, 226), and show the effect of the conspiracy on interstate shipment of sugar, and in addition substantiate plaintiff's theory of damages.

"Natural competitive causes in the light of supply and demand in world conditions" would have affected all the three refiners the same. Yet, as we have shown, the difference between Crystal's freight charges and Spreckels' in 1938 (no conspiracy) was .3467 and in 1941 (conspiracy) the difference was only .00398. How could that possibly be due to "natural competitive causes"? (*Ball v. Paramount Pictures,* 169 F. 2d 317, 319.)

Petitioner, as did the defendants in *Interstate Circuit v. U. S.*, 306 U. S. 208, 226, produced as witnesses only the subordinates who had nothing to do with and knew nothing about the conspiracy or its execution and it is their testimony that petitioner cites. It dared not produce its President, or General Manager, or Chairman of the Board! Furthermore, the record shows that the 1939 crop was "a little below average" [R. 614] and Clarksburg sales dropped in 1939 from 1938 [Ex. C, R. 720] so that the increase of Crystal's freight cost from .1912 in 1938 to .438 in 1939 could not have been due to a "bumper crop" or "supply and demand"!

When we take these freight figures and also take the figures as to the profits of the company (the profits of the company zoomed during the conspiracy years, while the returns of the growers, supposedly in the same boat, in a 50-50 deal, were reduced) we can only reach one con-

clusion and that is that the purposes set forth in Mr. Zitkowski's letter were achieved—the conspiracy was "of course to benefit the producers," by doing away with "cut-throat competition" in the sale of sugar.

The most that petitioner can claim for its isolated bits of evidence cited by it is that they conflicted with the evidence (direct or inferred) above set forth; but conflicting evidence is of no help to an appellant.

The actual figures for 1938 and 1939 crop years show that these freight costs were an important element in so far as the growers' net was concerned. In 1938, when there was no conspiracy, the amount that Crystal paid for freight on Clarksburg sugar, was $.1912, but in 1939, when the conspiracy was in effect, this same item amounted to $.438 based on the joint Northern California return for 1939, however, the deduction for freight paid on sugar was $.479 or $.2878 more than Crystal's 1938 deduction. Mandeville's 1939 crop of sugar beets was 22,355.6 tons of 18.25% sugar content. If the joint Northern California deduction for freight for 1939 had been the same as the 1938 deduction of Crystal at its Clarksburg factory, then the average net return to the grower would have been $.2878 more than it was. (.479 minus .1912 equals .2878.) That means that the joint net return for 1939 would have been $3.4188 instead of $3.131. ($3.131 plus $.2878 equals $3.4188.) If we apply this figure to the 1939 Crystal contract, the mathematical result would be that Mandeville would have received for 1939 (based upon $3.4188 net return instead of $3.131 net return) the sum of $119,985.05 instead of $107,262.18, or a difference of $12,713.87 for this one item alone! In other words, the increase of the amount paid on freight from that paid by Crystal in 1938 (no conspiracy) under its Clarksburg con-

tract, to that paid on the 1939 (conspiracy) joint return, resulted in Mandeville receiving, for its 1939 crop, $12,-713.87 less than it would have received. (Yet petitioner by its theory of damage insists that Mandeville was benefited and not damaged in 1939!) This amounts to a decrease of 11.8% in Mandeville's dollar and cents return from this one item alone, and clearly shows the importance of the "freight on sugar" deduction, particularly when we keep in mind the fact that Holly and Spreckels had a difference of less than 1% in their respective 1938 and 1939 freight charges!

The inference is plain that as part of the conspiracy petitioner shipped more sugar east instead of storing it, or that it shipped sugar to more distant points, because during the first year of the conspiracy its freight costs more than doubled on decreased sales, while those of the other two companies (operating in the same territory under the same conditions) stood practically still, while during the rest of the conspiracy, the freight charges of the three companies came almost together, but as soon as the conspiracy was over and competition was restored, the freight charges of Crystal decreased and those of Holly and Spreckels increased! Inferences supply evidence in support of judgments. This analysis of the freight costs clearly show that the conspiracy was, as the Zitkowski letter showed [R. 758-9] not merely a conspiracy fixing prices paid growers for beets, but a conspiracy involving sugar and competition in the sale of sugar. Furthermore, it substantiates the court's findings that the damages were awarded by the court on the "conservative side."

Hardy and Holmes and the Other "Live" Witnesses Called by Petitioner Had No Knowledge of the Conspiracy. Their Testimony Is of No Value for Reversing the Judgment and at Most Creates a Mere Conflict.

Petitioner states (p. 4):

> "At the trial petitioner introduced positive, uncontradicted testimony that the joint net method of calculating sugar beet prices had no effect upon price, supply or competitive conditions in the interstate sugar trade . . ."

On page 12, petitioner says:

> "Not only did respondent fail to *prove* the allegations as to effects in interstate commerce which this Court had taken as true upon the prior appeal, but petitioner adduced evidence which negatived the existence of such effects. At the trial, following remand, petitioner introduced positive testimony that the activities complained of had no effect on price, supply or competitive conditions with reference to sugar, or on petitioner's marketing methods or sales efficiency. [R. 694, 696, 697, 719-720.]"

These statements are not true and the sole authorities in support of it are isolated citations from testimony of Hayden (eastern sales manager), and Hardy (western sales manager), and others who knew nothing about the conspiracy! The undisputed evidence shows that neither Hayden nor Hardy, nor the other "live witnesses," had any knowledge of the conspiracy or even knew about the change from one system to another and did not handle the sales of the western sugar of Crystal in the eastern territory. [R. 432-3.] These were handled by the President of the Company, Mr. Wilds, to whom Hayden and Hardy

reported. [R. 432-6, 687-8, 722.] "Sales of all . . . sugar were directed by the President of the company from the head office at Denver." [Finding 18-A, Supp. 44.] Hardy reported directly to President Wilds. [R. 420, 722.]

Hardy sold sugar in the western territory on the basing point system, using San Francisco as the base point [R. 431] but he knew nothing about the price at which western sugar was sold in eastern territory because that was handled from Denver by Wilds. [R. 432-3.] He was not even consulted as to such matters! The first time Hardy knew about such sales was when he received a shipping report after the sugar was shipped. [R. 422.] In his western sales, he had authority to sell a specific quota of sugar at San Francisco base price (*i. e.*, the list price plus freight from San Francisco), but he could not sell at less than that price without specific consent from Denver. [R. 434-5-6, 722.] Hayden also sold on the base point system. [R. 684-5.] He, like Hardy, reported to the President. [R. 687-8.] He knew nothing about the conspiracy or the reasons for it. [R. 696.] Petitioner conceded that a conspiracy existed but instead of producing the men who made the deal and knew the purposes for it and carried them out, produced two subordinates who knew nothing about it!

But where was Wilds, the man that Zitkowski testified told him of the "decision of the sales department" to adopt the joint return with Holly and Spreckels for Northern California [R. 393], and who ordered the shipment of western sugar into eastern territory? [R. 432-3.] Neither he nor the Chairman of the Board of Directors, was produced by defendant. The doctrine of *Interstate Circuit v. United States*, 306 U. S. 208, 226, applies.

Hayden and Hardy and the other "live" witnesses, were not considered important enough to be taken into the confidence of the policy makers of the company by being told of the admitted conspiracy or its purposes and they knew nothing of it. They had nothing to do with carrying it out. Therefore their testimony is valueless, but even if it has some value, it merely created a conflict of evidence and a judgment cannot be reversed on that ground. (See *Interstate Circuit v. United States,* 306 U. S. 208, 226.)

The Individual Net Returns.

In 1938 Crystal, Holly and Spreckels competed in Northern California. In 1939, 1940 and 1941 they were in a price-fixing conspiracy. The separate net returns are:

	1938	1939	1940	1941
Crystal	3.2973	3.123	3.163	3.970
Holly	3.169	3.211	3.095	3.976
Spreckels	3.1280	3.1037	3.197	3.9320

In 1938, when there was no conspiracy, Crystal had a substantial advantage over both Holly and Spreckels, but during each of the three years of the conspiracy, Crystal's advantage was gone, and at no time during the conspiracy was it ever again top company.

In 1938, when there was no conspiracy, the difference between the high and low of the three companies was .1693, but during the conspiracy this difference diminished year by year to .044 as the net average of the three companies approached each other. (1938—.1683; 1939—.1073; 1940—.1029, and 1941—.0440.)

In 1939 Crystal's net dropped .1743 from 1938 or 5.3%. During the same period Holly's increased .052 or 1.6% and Spreckels decreased .0243 or less than 1%.

Crystal's individual net return for 1940 showed a decrease of .1343 from its 1938 non-conspiracy figure, or a decrease of 4%. The same year, Holly decreased but .074 or 2.3%, while Spreckels increased .0699 or 2%.

These were not coincidences. World conditions, curtailment problems, scare buying and all other similar matters should have affected each of the three companies identically and there is no evidence to the contrary. If the conspiracy had for its sole purpose merely the substitution of a joint net for a single net, Crystal's advantageous position, in so far as its single net is concerned, would have continued. But, as the Zitkowski letter pointed out, the purpose of the conspiracy went far beyond the substitution of the joint net for the single net. As the court found, in Finding 12:

> "As a further, direct, expected and planned result of said conspiracy, said three manufacturers operated, in so far as the growers' returns were concerned, as if they were one corporation owning and controlling all sugar beet factories in Northern California, but with three complete, separate overheads and selling expenses." [Supp. 41.]

That is why the differences between the high and low company in competition year 1938, after 3 years of combination and conspiracy, reached a practical vanishing point by 1941.

The Awards of Damages Were Proper.

Petitioner Made No Motion for New Trial Below and Therefore Could Not Raise the Point of Excessive Damages.

Petitioner made no motion for new trial below but now contends that damages were excessive. The point of excessive damages cannot be raised for the first time on appeal when not presented at the trial court by motion for new trial. This rule of law is applicable both in jury cases and in non-jury cases.[18]

The reason for the rule is stated in 3 Am. Jur., page 43:

> "In most jurisdictions it is regarded as the duty of counsel to give the trial court an opportunity by motion for new trial to correct whatever error it may have made in respect to certain matters which might properly be made the ground of such a motion, such as . . . the amount recovered."

The granting or denying of a motion for new trial is within the discretion of the trial court (*Fairmount Glass Works v. Cub Ford Coal Co.*, 287 U. S. 474, 482), but unless such a motion is presented there can be no exercise of that discretion, and, therefore, no abuse of that discretion, and, therefore, nothing for an appellate court to review.

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[18] *Reliance Coal & Coke Co. v. Brydon & Bro.* (C. C. A. 6th), 286 Fed. 827, 832; *Bate v. Jolin*, 206 Cal. 504, 508; *Gates v. Gautier*, 29 Cal. App. 2d 524, 526; *Springer v. Angeles Credit Co., Ltd.*, 44 Cal. App. 2d 712, 716; *Wood v. Keller*, 72 Cal. App. 2d 14, 17; *Alexander v. McDonald*, 86 Cal. App. 2d 670, 671; *Lejeune v. General Petroleum Corp.*, 128 Cal. App. 404, 410.

Assuming That Petitioner Can Raise the Point, the Damages Awarded Were Not Speculative or Inconsistent, but as the Trial Court and Court of Appeals Pointed Out, Were Conservative. Both Courts Followed the Supreme Court's Criteria.

There are three leading Supreme Court cases as to damages in Sherman Act cases: *Eastman Kodak Co. v. Southern Photo Materials Company* (1927), 273 U. S. 359, 376; *Story Parchment Co. v. Paterson Parchment Paper Co.* (1931), 282 U. S. 555, 561, and *Bigelow v. R. K. O. Radio Pictures* (1946), 327 U. S. 251, 254. These hold:[19]

1. Plaintiffs in a Sherman Act case are entitled to receive the reasonable price they would have received had it not been for the conspiracy and their damages are the difference between what they should have received had there been no conspiracy and what they did receive under the conspiracy.

2. Such plaintiffs need not show these damages with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result may be only approximate.

3. A defendant, whose wrongful conduct has rendered difficult the ascertaining of the damages suffered by the plaintiffs, is not entitled to complain that the damages cannot be measured with the same exactness and precision as would otherwise be possible.

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[19]See also *American Can Co. v. Ladoga Co.*, 44 F. 2d 763; *Rankin v. Assoc. Bill Posters*, 42 F. 2d 152; *Package Corp. v. Sealright*, 141 F. 2d 972; *Broffee v. Horton*, 172 F. 2d 489, 495; 88 *U. of Penn. Law Rev.* 511; *Peto v. Howell*, 101 F. 2d 353.

4. The Court cannot assume that the prices would have been the same during the period of conspiracy had the conspiracy not existed. The natural and probable effect of the combination and price fixing would be to destroy normal prices.

5. Comparison of prices before and after the unlawful acts afford sufficient basis for the computation of damages where the defendant's unlawful acts prevented plaintiffs from making a more precise proof.

6. "It is fair to state that the natural and probable effect of the combination . . . would be to destroy normal prices."

7. "There is no sound reason for throwing any part of the loss upon the injured party. . . . The adoption of any arbitrary rule which will relieve the wrongdoer from any part of the damages and throw the loss upon the injured party, would be little less than legalized robbery. Whatever of uncertainty there may be in this mode of estimating damages is an uncertainty caused by the defendant's own wrongful act; and justice and sound public policy alike require that he should bear the risk of the uncertainty thus provided."

8. The Court may act "on probable and inferential as well as upon direct and positive proof" in estimating damages.

9. The Court shall "conclude as a matter of just and reasonable inference from the proof of defendant's wrongful acts and their tendency to injure plaintiffs' business and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendant's wrongful acts had caused damages to the plaintiffs."

Bigelow v. R. K. O. Radio Pictures, 327 U. S. 251 at page 266, stated:

> "The comparison of petitioners' receipts *before and after* respondents' unlawful action impinged on petitioners' business afforded a sufficient basis for the jury's computation of the damage, where the respondents' wrongful action had prevented petitioners from making any more precise proof of the amount of the damage."

The Supreme Court has held that "decline in prices, profits and values" (during the conspiracy), "not shown to be attributed to other causes," was caused by defendant's unlawful acts. (*Bigelow v. R. K. O. Radio Pictures,* 327 U. S. 251.) *In other words, the showing of a decline of plaintiffs' returns during the conspiracy in comparison with their returns before or after, is presumed to be due to the conspiracy unless the defendant shows to the contrary.* This burden to show the contrary is on the defendant.

The *University of Illinois Law Forum* for Winter, 1950 (No. 4), is devoted to "Anti-Trust Law." Commencing at page 659 is a discussion of "The Treble Damage Action." We set forth extracts from it in our Supplement, commencing with page 56, because it answers practically every argument that petitioner makes as to damages.

The principles of law above referred to should be applied to the following facts:

(a) The 1939, 1940 and 1941 contracts were void and invalid.

(b) During 1939, 1940 and 1941 all sugar refiners in California were in price-fixing conspiracies, one in North-

ern California (Crystal, Holly and Spreckels) and one in Southern California (Crystal, Holly and Union), and there was no free market in California for sugar beets or for the purchase of sugar beet seeds. During those years California sugar beets could only be sold to, and seeds could only be purchased from one of the conspirators and the grower either dealt with one of them at the agreed price, or could not even plant sugar beets. But there was a free market in 1937 and 1938 (the only two years that Crystal operated its Clarksburg factory prior to the conspiracy) and again in 1942 and 1943. The 1943 market, however, was a price support market with prices determined in part on the Commodity Credit Corporation's support payment. 1937, 1938 and 1942, however, used the 50-50 method of payment (by a schedule with certain variables) similar to those used in 1939, 1940 and 1941, and therefore offer a proper method of comparison.

(c) The price received by respondents during the first year of the conspiracy (1939 crop year) was less than that received during either of the two preceding crop years (1937 or 1938) when there was no conspiracy; the price received during the third crop year of the conspiracy (1941) was less than that received during the next subsequent crop year (1942) when there was no conspiracy; the price received during the second or middle crop year of the conspiracy (1940) was less than that received during the crop years either immediately before (1937 and 1938) or immediately after (1942) the conspiracy.

(d) Petitioner carried over a substantial portion of each year's crop to the succeeding year. (The figures hereinafter set forth are mathematically obtained from answers to Interrogatories 5-A and 9-B.) The carry over of the 1938 Clarksburg production of sugar was

39.467% of the sugar manufactured at Clarksburg during the 1938 cropping season. The carry over of Clarksburg sugar at the end of the 1939 season was 31.998% of the sugar manufactured at Clarksburg during the 1939 cropping season. The carry over of Clarksburg sugar at the end of the 1940 season was 39.917% of the sugar manufactured at Clarksburg during the 1940 cropping season. The prices paid the growers under the 1937 through 1942 contracts were by formulas whereby the grower and the company each received 50% of the selling price of the estimated sugar extracted. Examples are in the note.[20]

We set forth in our Supplement, commencing with page 60, five methods of determining damages taken from the evidence herein. Each of the first four of such methods of determining damages is one approved by the Supreme Court decisions and if the trial court had adopted any of them, petitioner would have no grounds or com-

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[20]A grower delivered beets of 20% sugar content when the average net selling price of the sugar was 4¢ a pound. One ton of beets equals 2,000 pounds. If the beets had a 20% sugar content, then the beets contain 20% of 2,000 pounds or 400 pounds of sugar. If the average selling price of sugar that season was 4¢ a pound, then the amount of money secured for the sugar in that ton of beets would be 400 pounds at 4¢ or $16.00. The schedules set forth in the contracts were based upon an estimated percentage of extraction. If the estimated percentage of extraction was 100%, then the grower of beets of a 20% sugar content in a season where the average net return was 4¢ a pound, or $4.00 a hundred pounds, would receive 50% of the $16.00, or $8.00 and $8.00 would be the figure set forth in the schedule at the point where the 4¢ line met the 20% line. But if the schedule was drawn up based upon an expected percentage of extraction of 90% instead of 100%, then the expected dollar value of a ton of sugar beets of 20% sugar content (*i. e.*, 400 pounds of sugar) would be 90% of $16.00, or $14.40, and the grower would receive one-half thereof, or $7.20, and that would be the figure that would appear in the schedule instead of the $8.00 figure above referred to.

plaint. The fifth method is an alternative method and represents a minimum amount of damages. We summarize these:

		1	2	3	4	5
1939	Mandeville	$65,459.34	$50,786.37	$15,749.51	$28,875.13	$17,892.18
1940	Mandeville	$62,630.72	$56,118.23	$38,907.27	$64,117.79	$18,153.95
1941	Zuckerman	$15,872.77	$38,907.27	$15,872.75	$61,101.74	$ 8,757.95
1941	Evans	$ 5,393.10	$ 5,393.10	$ 5,393.10	$18,955.31	$ 2,374.49

The Trial Court Applied the Proper Supreme Court Criteria. Its Figures Were Conservative, Not Inconsistent. Petitioner's Argument as to Damages Are Unsound.

The trial court wanted to be "conservative in its estimation of damages." [R. 227; Finding 18-D; Supp. p. 45.] Its opinion stated that 1942 was an abnormal year [R. 226-7], and that the Court used the pre-conspiracy 1937-1938 prices for the two years nearest thereto, to-wit, 1939 and 1940, but instead of using the 1942 prices for determining the 1941 damages, the trial court, according to its opinion, awarded 25 cents a ton as damages. [R. 226-7.] This was not speculative or inconsistent but was based upon findings, not excepted to by petitioner. In Finding 10 the Court found that "as a result" of the competition that existed in Northern California prior to the 1939 crop season," sugar beet growers in Northern California north of the 36th parallel, who had contracted with defendant, received an average of from 28 cents to 50 cents per ton more for sugar beets delivered to defendant corporation under said standard contract than did growers of beets of identical sugar content delivered to the other manufacturers of beets delivered in Northern

California." [Supp. pp. 40-1.] In Finding 11 the Court found that "during said crop seasons of 1939, 1940 and 1941, as a direct result of said conspiracy, expected and planned by said conspirators, there was no longer competition between the conspirators as had previously existed in their purchase of sugar beets." [Supp. p. 41.] In Finding 12 the Court found as a "direct, expected and planned result of said conspiracy that said three manufacturers operated, in so far as the growers' returns were concerned, as if they were one corporation owning and controlling all sugar beet factories in Northern California but with completely separate overheads and selling expenses." [Supp. p. 41.]

The Court considered that 1942 was an abnormal year and therefore felt that it could not take the *entire* results of that year to compare with 1941. It recognized that the Supreme Court had held

> *"There is no sound reason for throwing any part of the loss upon the injured party.* . . . The adoption of any arbitrary rule which will relieve the wrongdoer from *any part* of the damages and throw the loss upon the injured party would be little less than legalized robbery." (*Story Parchment v. Paterson Parchment Paper Co.,* 282 U. S. 555),

but at the same time it wanted to be "conservative" so it took 25 cents a ton as the portion of the difference between 1942 and 1941 price which it felt was not due to an abnormal year. This 25 cents was based upon Finding 10 [Supp. pp. 40-1] that Crystal growers in 1938 (the last year before the conspiracy) received from 28 cents to 50 cents per ton more than the growers who delivered to either of the other two companies. The Court took less than the minimum. Therefore, when the Court

awarded 25 cents per ton, it was being consistent but extremely conservative in awarding but a portion of what it could have awarded.

The Court would have been justified under the Supreme Court criteria in awarding Zuckerman for 1941 $15,-872.77 under Basis No. 1, or $38,907.27 under No. 2, or $15,872.75 under No. 3, or $61,101.74 under No. 4, or $8,757.95 under No. 5, each trebled. Instead, it awarded Zuckerman for that year $3,528.00, trebled. Petitioner is indeed fortunate in having the Court adopt a "conservative figure," but petitioner could not be prejudiced because the Court did not award more. The same is true as to the other plaintiffs.

Petitioner ignores the illegality of the entire contract and the absence of a free market and without any authority for such statement, claims that the difference between the joint net and Crystal's net during the conspiracy was *"prima facie"* the amount of damages. It was not *prima facie* nor did it represent the actual damage. No farmer could have sold his beets during the conspiracy years on the single net basis. No beets were sold on that basis. Therefore, it did not and could not represent reasonable market value. As the Supreme Court pointed out, "the restraint and its monopolistic effects were reflected throughout each stage of the industry permeating the entire situation . . ." [Supp. p. 24] "by the tie-in provision" (whereby the price paid the growers was fixed by a formula in which the net sale price of the sugar was one of the variables) "they interlaced those interstate effects with the price paid for the beets." Defendant cannot isolate one portion of what the Supreme Court calls an "inextricable relationship" [Supp. p. 23] and say that that isolated portion represents what the grower would have

received had there been no conspiracy when no grower received payment on such a basis. The evidence heretofore pointed out (which showed that the profits of Crystal zoomed during the conspiracy years while Crystal's net return on which growers were paid decreased and Crystal's profit decreased as soon as the conspiracy was over and Crystal's net return increased) when taken into consideration with the fact that the parties were supposed to be in a 50-50 profit sharing proposition "in the same boat," clearly show the complete fallacy of petitioner's argument. The test laid down by the Supreme Court is a comparison of prices before and after the conspiracy with those during the conspiracy and a consideration of the gain made by the petitioner because of the conspiracy. These are the bases of the figures the trial court and the Court of Appeals used.

This is not a situation in which the sugar beets could have been sold on the open market, but one where there was no open market in which plaintiffs could have sold their beets, because the conspirators had a complete monopoly and refused to buy except on the conspiracy-fixed terms. [Finding 9-(d), Supp. p. 40.] A grower could not buy seed or grow sugar beets unless he signed one of the conspiracy-written contracts. [Finding 6-(e), Supp. p. 36.]

In *Ball v. Paramount Pictures,* 169 F. 2d 317, the Court stated at page 319:

> "In so holding we think the lower court failed to accept the clear implications arising from appellees' acts and conduct. 'The picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats close together belongs to a darker age.' . . . That conspiracy cannot be explained away

> by allegations of 'normal processes of competition; theaters . . . less attractive; . . . service . . . inferior'; or because the new theatre operators are 'not as efficient business men as the defendants.' "

Petitioner here seeks to do what that Court said cannot be done. The pre-conspiracy contracts between Crystal and the growers, were not technical joint ventures but practical ones, whereby, as the Court pointed out, the company avoided the responsibilities of joint ventures but received the advantages. [R. 604-5.] Crystal's counsel characterized the plan as "a profit-sharing proposition, pure and simple. . . . They were in the same boat we were. If we made money, then they made money. If we lost money, then they would lose money." [R. 322.] The trial court put the same thing in another way when it said: "But it was an advantage to them" (the refiners) "to change the contract, and if it was an advantage to them, to the refiners, then it would have to be at the expense of the growers."

For the single-net contract operating *under competition* there was substituted by the conspiracy a joint-net contract *under a price-fixing monopoly*. The effect caused by the monopoly to this profit-sharing proposition (between the two parties in the same boat who were supposed to make money and lose money together) was that the profits of the one zoomed and the profits of the other decreased during the conspiracy and then, when the conspiracy was over and competition was restored, the reverse occurred.

In 1938 when there was no conspiracy, the parties were "in the same boat"; if one made money the other made money; if one lost money, the other lost money. Plaintiff was entitled to that same result during 1939, 1940 and

1941, but did not get it. Therefore, they were entitled to be recompensed in treble the difference between what they did get and what they would have received had it not been for the conspiracy. The calculations we have set forth under Basis No. 4 of calculating damages shows these damages mathematically. The trial court, in an endeavor to be conservative, awarded less.

Petitioner insists that the correct measure of damages is the difference between the joint return as paid to the growers and what would have been paid them if they were paid the single return of Crystal during the same conspiracy period, although no grower in all California was paid on the latter basis. Petitioner takes what happened under the conspiracy not only for the amount subtracted but also for the amount from which it is subtracted and ignores the Supreme Court cases which took the prices or profit before and after the conspiracy and compared them with the prices or profits made during the conspiracy.

Petitioner states (p. 16) that the award of damages bears no relation whatsoever to respondents' actual injury. That is not true. As joint participants in a 50-50 profit-sharing proposition, the amount in which respondents were "adversely affected" was the difference between the returns they should have received under the profit-sharing competitive plan and the returns they actually received under the conspiracy. We know the percentage that the profits of Crystal increased during the conspiracy. We applied the same percentage to the returns received by the growers. Petitioner can talk about world conditions, Pearl Harbor, curtailment, rationing, panic-buying, etc., as it did before the Court of Appeals, but each should have affected equally the parties to a

50-50 profit-sharing plan in which both parties were "in the same boat" and made profits together and lost money together!

The entire basis of petitioner's theory of damages is wrong. It completely ignores this 50-50 sharing of profits by two parties "in the same boat," and the purposes of the conspiracy set forth in the Zitkowski letter.

There is another answer to petitioner's argument that the single net of Clarksburg during the conspiracy years should be used in determining the measure of damages and that is that no grower did or could have sold under such a price and therefore it did not and could not represent reasonable market value. The Court found that during the conspiracy years the only sugar beet seeds commercially available in California were those securable from one of the conspirators and the only method of sale of marketable sugar was by sale to one of them under the standard contract whereby the price was determined by the joint net. A grower either signed the joint return contract or could not get seeds to plant beets or a practical market to sell beets. [Supp. pp. 36, 40.] No single net return market was available.

There is another answer. The Court found [Finding 18-C; Supp. p. 45] that the reasonable prices for the sugar beets delivered by the plaintiffs to defendants for the years here involved were: "for the crop year 1939, $15,749.51 more than Mandeville received from Crystal. . . ." etc. Similar findings were made as to each plaintiff for each of the years. These were findings of fact by the District Court, approved by the Court of Appeals, and the Supreme Court will not interfere with them. Respondents were entitled to receive the reasonable price of their

beets. They did not receive a reasonable price because of the conspiracy. [Finding 18-D; Supp. p. 45.] They were awarded the difference between what they did receive and this reasonable price that they should have received, trebled. That was a proper award of damages.

There is another answer. Even though petitioner's theory of damages is equally tenable with that found by the District Court, the appellate court will not substitute petitioner's theory for that of the trial court. (*Hart v. California Pac. T. & T. Co.*, 9th Cir., 136 F. 2d 430, 432.)

Both the trial court and the Court of Appeals felt that petitioner's single-net for the conspiracy years was "tainted or rendered unreliable by the operation of the conspiracy." This was true for many reasons: First, they were what the Supreme Court called an "inextricable" part and parcel of an illegal conspiracy; second, respondent failed to produce its officers who put it into the illegal conspiracy and who knew and carried out its purposes, and that failure, as we have shown, justifies and requires an inference that every part of the deal was tainted and rendered unreliable; third, the Zitkowski letter and his testimony regarding it clearly show that the conspiracy was not limited to substituting the joint for the single return as petitioner incorrectly but repeatedly contends; fourth, the evidence as to freight rates and profits demonstrates the same result; fifth, "it is fair to state that the natural and probable effect of the conspiracy . . . would be to destroy normal prices." (*Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555); sixth, they did not represent the reasonable value of the beets. This Court

> "cannot assume that the prices would have been the same during the period of conspiracy had the con-

spiracy not existed. The natural and probable effect of the combination and price fixing would be to destroy natural prices." (*Idem.*)

The Supreme Court has specifically held that no part of the loss should be thrown on the injured party—otherwise (*Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555),

> "it would be little less than legalized robbery. Whatever of uncertainty there may be in this mode of estimating damages, is an uncertainty caused by defendant's own wrongful act; and justice and sound public policy alike require that he (defendant) should bear the risk of the uncertainty thus provided."

Conclusion.

The Supreme Court has held that the amended complaint states a cause of action. Respondent has proved every material allegation there contained and the trial court has found accordingly after a full, fair trial on the merits, and has awarded plaintiffs damages "on the conservative side."

The petition for certiorari should be denied and this Court should either award petitioner $2,500.00 additional attorney fees to cover services herein or should order a hearing as to the amount before the District Court.

Respectfully submitted,

STANLEY M. ARNDT and
GUY RICHARDS CRUMP,
By STANLEY M. ARNDT,
Attorney for Respondent.

SUPPLEMENT.

IN THE

Supreme Court of the United States

No. 75—October Term, 1947.

Mandeville Island Farms, Inc., and Roscoe C. Zuckerman, Petitioners,

v.

American Crystal Sugar Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[May 10, 1948.]

Mr. Justice Rutledge delivered the opinion of the Court.

The action is for treble damages incurred by virtue of alleged violation of the Sherman Act, §§ 1 and 2, 26 Stat. 209, 38 Stat. 731, 15 U. S. C. §§ 1, 2, 7, 15. The case comes here on certiorari, 331 U. S. 800, from affirmance by the Circuit Court of Appeals, 159 F. 2d 71, of a judgment of the District Court, 64 F. Supp. 265. That judgment dismissed the amended complaint as insufficient to state a cause of action arising under the Act. In this posture of the case, the legal issues are to be determined upon the allegations of the amended complaint.[1]

[1]The original complaint contained three counts, the first alleging violations of the Sherman Act and the second and third charging breach of contracts made in 1940 and 1941 respectively. In order to expedite decision and review upon the Sherman Act contention, by stipulation the amended complaint was filed setting forth, with an amendment to be noted, see note 5, only the allegations of the Sherman Act count. The stipulation provided for following this course without prejudice to further assertion by petitioners of rights under the two contract counts within a specified period following final determination of the Sherman Act issues.

The main question is whether, in the circumstances pleaded, California sugar refiners who sell sugar in interstate commerce may agree among themselves to pay a uniform price for sugar beets grown in California without incurring liability to the local beetgrowers under the Act. Narrowly the question is whether the refiners' agreement together with the allegations made concerning its effects shows a conspiracy to monopolize and to restrain interstate trade and commerce or one thus affecting only purely local trade and commerce.

The material facts pleaded, which stand admitted as if they had been proved for the purposes of this proceeding, may be summarized as follows: Petitioners' farms are located in northern California, within the area lying north of the thirty-sixth parallel. The only practical market available to beet growers in that area was sale to one of three refiners.[2] Respondent was one of these. Each season growers contract with one of the refiners to grow beets and to sell their entire crops to the refiner under standard form contracts drawn by it. Since prior to 1939 petitioners have thus contracted with respondent.

The refiners control the supply of sugar beet seed. Both by virtue of this fact and by the terms of the con-

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[2]It was alleged that the beets, when harvested, are "bulky and semi-perishable and incapable of being transported over long distances or of being stored cheaply or safely for any extended period . . . when ripe, deteriorated rapidly if kept in the ground and not harvested, and it was necessary to harvest them promptly when matured."

There were also allegations that initial outlay, annual upkeep and operating expenses, and time required for erecting and equipping a refinery, were so great that no competition from any new refinery could be expected short of two years at best; that the three refiners had a monopoly in the area of the supply of seeds and of refining; and that no grower in the region could sell beets at a profit except to one of the three refiners.

tracts, the farmers are required to buy seed from the refiner. The seed can be planted only on land specifically covered by the contract. Any excess must be returned to the refiner in good order at the end of the planting season.

The standard contract gives the refiner the right to supervise the planting, cultivation, irrigation and harvesting of the beets, including the right to ascertain quality during growing and harvesting seasons by sampling and polarizing. Before delivering beets to the company, the farmers must make preliminary preparations for processing them into raw sugar.[3] The refiner has the option to reject beets if the contract conditions are not complied with and if the beets are not suitable in its judgment for the manufacture of sugar.

Prior to 1939 the contract fixed the grower's price by a formula combining two variables, a percentage of the refiner's net returns per hundred pounds from sales of sugar and the sugar content of the individual grower's beets determined according to the refiner's test.[4]

Sometime before the 1939 season the three refiners entered into an agreement to pay uniform prices for sugar beets. The mechanics of the price-fixing arrangement were simple. The refiners adopted identical form con-

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[3]These include cutting off the beet tops, trimmings the crowns in a specified way, and removing all foreign substances likely to interfere with factory work.

[4]Net returns from sugar sales were measured by gross sales price less selling expenses directly applicable to sugar. Monthly settlements were made for beets delivered during the preceding month on the estimated net returns of the refiner. But final settlement had to be deferred until the end of the season when net returns could be accurately determined.

tracts and began to compute beet prices on the basis of the average net returns of all three rather than the separate returns of the purchasing refiner. Inevitably all would pay the same price for beets of the same quality.

Since the refiners controlled the seed supply and the only practical market for beets grown in northern California, when the new contracts were offered to the farmers, they had the choice of either signing or abandoning sugar beet farming. Petitioners accordingly contracted with respondent under this plan during the 1939, 1940 and 1941 seasons. The plan was discontinued after the 1941 season. Because beet prices were determined for the three seasons with reference to the combined returns of the three refiners, the prices received by petitioners for those seasons were lower than if respondent, the most efficient of the three, had based its prices on its separate returns.

The foregoing allegations set forth the essential features of the contractual arrangements between the refiners and the growers and of the agreement among the refiners themselves. Other allegations were made to complete the showing of violation and injury . They relate specifically to the peculiarly integrated character of the industry, effects of the arrangements upon interstate commerce, and the relation between the violations charged and the injuries suffered by petitioners.

With reference to the industry in general, it was stated that sugar beets were grown during the seasons 1938 to 1942 on large acreages not only in northern California but also in Utah, Colorado, Michigan, Idaho, Illinois and other states. The crops so grown, when harvested, were not "sold in central markets as were potatoes, onions, corn,

grain, fruit and berries, but were produced by growers under contract with manufacturers or processors and immediately upon being harvested were delivered to these manufacturers and taken to their beet sugar refineries where the sugar beets were manufactured by an elaborate process into raw sugar by the said manufacturers, who thereafter sold the resulting sugar in interstate commerce." Then follow the allegations summarized above in note 2 concerning the bulky and semiperishable nature of sugar beets, the impossibility of transporting them over long distances or of storing them cheaply or safely, their rapid deterioration when ripe, and the necessity for prompt harvesting and marketing. These allegations must be taken as intended and effective to put the agreements complained of in the general setting of the industry's unique structure and special mode of operation.

The specific allegation is added that the sugar manufactured by respondent and the other northern California refiners from beets grown in the region "was, during all of said period [1938 to 1942], sold in interstate commerce throughout the United States."

By way of legal as well as ultimate factual conclusions the amended complaint charged that respondent had unlawfully conspired with the other northern California refiners to "monopolize and restrain trade and commerce[5] among the several states and to unlawfully fix prices to be paid the growers . . . all in violation of the anti-trust

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[5]At this point the words "in sugar and sugar beets" appeared in the original complaint. They were stricken from the amended complaint by petitioner's counsel prior to dismissal of that complaint. Cf. note 1. This change however did not affect numerous other allegations remaining in the amended complaint concerning the combination's restrictive and monopolistic effects upon interstate trade in sugar. See note 6 and text; also note 24 and text Part IV *infra*.

laws . . ."; and that each refiner no longer competed against the others as to the price to be paid the growers, but paid the same price on the agreed uniform basis of average net returns.

There were further charges that prior to 1939 the northern California refiners had "competed in interstate commerce with each other as to the performance, ability and efficiency of their manufacturing, sales and executive departments, and each strove to increase sales return and decrease expenses," with the result that for 1938 respondent secured substantially greater "net gross receipts of sales of sugar" than the other refiners. These in turn were reflected in the payment of 29½ to 52½ cents per ton more to petitioners and other growers dealing with respondent than was paid by the other refiners to their growers.

However, for the seasons 1939, 1940 and 1941, under the new uniform contracts and prices, "there was no longer any such competition . . ." Instead it was alleged upon information and belief that, as a result of the alleged conspiracy, respondent did not conduct its interstate operations as carefully and efficiently as previously or "as it would have had said conspiracy not existed." In consequence, respondent received less in sales returns for raw sugar and incurred greater expenses than if competition had been free, and petitioners "did not receive the reasonable value of their sugar beets."

Further charges were that as "a direct, expected and planned result of said conspiracy, the free and natural flow of commerce in interstate trade was intentionally hindered and obstructed," so that instead of the refiners "producing and selling raw sugar in interstate commerce

. . . in competition with each other . . . they became illegally associated in a common plan wherein they pooled their receipts and expenses and frustrated the free enterprise system . . ."; all incentive to efficiency, economy and individual enterprise disappeared; and the refiners operated, "in so far as the growers were concerned," as if they were one corporation owning and controlling all factories in the area, but with three completely separated overheads and with none of the efficiency that consolidation into one corporation might bring.[6]

We are not concerned presently with the allegations relating to the injuries and amounts of damages inflicted upon petitioners,[7] except to say that they are sufficient to present those questions for support by proof, if the allegations made to show a cause of action arising under the statute are sufficient for that purpose.

In our judgment the amended complaint states a cause of action arising under the Sherman Act, §§ 1 and 2, and the complaint was improperly dismissed.

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[6]Paragraph XIX of the amended complaint summarized petitioners' conclusions as follows: "By reason of the foregoing acts of the defendant and its said conspirators, *interstate commerce in sugar was illegally restrained, competition therein* was not only substantially lessened but *was destroyed*, the price of sugar beets was illegally fixed, and an illegal monopoly was established, all in violation of the anti-trust laws of the United States, to the damage of plaintiffs as aforesaid." (Emphasis added.) Cf. notes 5 and 24.

[7]It is not clear whether damages were to be measured by the difference between the prices actually paid and those that would have been paid if based on respondent's separate returns, or by the difference between the prices paid and the prices set by the Secretary of Agriculture, pursuant to the Sugar Act of 1937, 50 Stat. 910, 7 U. S. C. § 1131 (d); see 5 Fed. Reg. 5231. But that is an issue that need not concern us now. Petitioner Mandeville Island Farms prayed judgment for $315,043.80; petitioner Zuckerman for $112,192.14.

I.

Broadly petitioners regard the entire sequence of growing the beets, refining them into sugar and distributing it, under the arrangements set forth, as a chain of events so integrated and taking place in interstate commerce or in such close and intimate connection with it that, for purposes of applying the Sherman Act, the complete sequence is an entirety and no part of it can be segregated from the remainder so as to put it beyond the statute's grasp.

Respondent, on the contrary, broadly severs the phase or phases of growing and selling beets from the later ones of refining them and of marketing the sugar. The initial growing process together with sale of the beets, and it would seem also the intermediate stage of refining, are taken to be "purely local," since all occurred entirely within California; therefore were wholly intrastate events; and consequently were beyond the Sherman Act's reach.

Connected with this severance is the assertion that the complaint alleges no monopolistic or restrictive effects upon interstate commerce, but only such effects in the intrastate phases of the industry.

Much stress is laid upon the so-called interruption of the sequence at the refining stage. Prior to the interruption only beets are involved, afterward only sugar. Since the two commodities are different and all that affects the beets takes place in California, including the restraints alleged upon their sale, the trade and commerce in beets is wholly distinct from that in sugar and is entirely local, as are therefore the restraint and monopolization of that trade. Admittedly once the beets are con-

verted into sugar and the sugar starts on its interstate journey to the tables of the nation, interstate commerce becomes involved. But only then is it affected, and nothing occurring before the journey begins or at any rate before the beets become sugar substantially affects or, for purposes of the statute's application, has relevance to that commerce.

Thus sugar together with its interstate sale and transportation is absolutely divorced from sugar beets, their production, sale and delivery to the refiner. Manufacture breaks the relationship and with it all consequences growing out of the restraints for the interstate processes and the purposes of the statute. In other words, since the restraints precede the interstate marketing of the sugar and immediately affect only the local marketing of the beets, they have no restrictive effect upon the trade and commerce in sugar.

This very nearly denies that sugar beets contain sugar. It certainly denies that the price of beets and restrictions upon it have any substantial relation in fact or in legal significance for the statute's purposes to the price of sugar sold interstate, when the restrictions take place within the confines of a single state and before the interstate marketing process begins.

II.

The broad form of respondent's argument cannot be accepted. It is a reversion to conceptions formerly held but no longer effective to restrict either Congress' power, *Wickard v. Filburn,* 317 U. S. 111, or the scope of the

Sherman Act's coverage. The artificial and mechanical separation of "production" and "manufacturing" from "commerce," without regard to their economic continuity, the effects of the former two upon the latter, and the varying methods by which the several processes are organized, related and carried on in different industries or indeed within a single industry, no longer suffices to put either production or manufacturing and refining processes beyond reach of Congress' authority or of the statute.

It is true that the first decision under the Sherman Act applies those mechanical distinctions with substantially nullifying effects for coverage both of the power and of the Act. *United States v. E. C. Knight Co.*, 156 U. S. 1. Like this one, that case involved the refining and interstate distribution of sugar. But because the refining was done wholly within a single state, the case was held to be one involving "primarily" only "production" or "manufacturing," although the vast part of the sugar produced was sold and shipped interstate,[8] and this was the main end of the enterprise. The interstate distributing phase, however, was regarded as being only "incidentally," "indi-

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[8]It has been previously noted here that the Court applied these labels as a heritage from prior decisions under the commerce clause, dealing not as the *Knight* case with an act or acts of Congress, but with the validity of state statutes, *Wickard v. Filburn*, 317 U. S. 111, 121; *United States v. South-Easern Underwriters Assn.*, 322 U. S. 533, 543-545, an approach reflecting Marshall's idea of the mutual exclusiveness of state and national power in this area and ignoring the later evolution of different conceptions in *Cooley v. Board of Wardens*, 12 How. 299. See *Prudential Ins. Co. v. Benjamin*, 328 U. S. 408, 412-427.

rectly," or "remotely" involved; and to be "incidental," "indirect," or "remote" was to be, under the prevailing climate, beyond Congress' power to regulate, and hence outside the scope of the Sherman Act. See *Wickard v. Filburn, supra* at 119 *et seq.*

The *Knight* decision made the statute a dead letter for more than a decade and, had its full force remained unmodified, the Act today would be a weak instrument, as would also the power of Congress, to reach evils in all the vast operations of our gigantic national industrial system antecedent to interstate sale and transportation of manufactured products. Indeed, it and succeeding decisions, embracing the same artificially drawn lines, produced a series of consequences for the exercise of national power over industry conducted on a national scale which the evolving nature of our industrialism foredoomed to reveal.[9]

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[9]Compare, *e. g., United States v. E. C. Knight Co.*, 156 U. S. 1, with *Standard Oil Co. v. United States*, 221 U. S. 1, and *United States v. American Tobacco Co.*, 221 U. S. 106; *Hammer v. Dagenhart*, 247 U. S. 251, with *United States v. Darby*, 312 U. S. 100; *Carter v. Carter Coal Co.*, 298 U. S. 238, with *Sunshine Coal Co. v. Adkins*, 310 U. S. 381; *United States v. Chicago, etc., R. Co.*, 282 U. S. 311, and *Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330, with *United States v. Lowden*, 308 U. S. 225; *Hopkins v. United States*, 171 U. S. 578, with *Stafford v. Wallace*, 258 U. S. 495; *Employers' Liability Cases*, 207 U. S. 463, 498, with *Virginia R. Co. v. Federation*, 300 U. S. 515, 557, and *Weiss v. United States*, 308 U. S. 321; *New York Life Insurance Co. v. Deer Lodge County*, 231 U. S. 495 and authorities cited, with *United States v. South-Eastern Underwriters Assn.*, 322 U. S. 533, and *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408.

We do not stop to review again in detail the familiar story of the progression of decision to that end, perhaps not told elsewhere more succinctly or pertinently than in *Wickard v. Filburn, supra.*[10] Suffice it to say that after coming back to life again in the *Northern Securities* case, 193 U. S. 197, for matters of transportation, the Sherman Act received a second rebirth in 1911 with the decisions in *Standard Oil Co. v. United States,* 221 U. S. 1, and *United States v. American Tobacco Co.,* 221 U. S. 106. Cf. *United States v. South-Eastern Underwriters Assn.,* 322 U. S. 533, 553 *et seq.*

Not thereafter could it be foretold with assurance that application of the labels of "production" and "manufacture." "incidental" and "indirect," would throw protective covering over those processes against the Act's consequences. Very soon also came the *Shreveport Rate Cases,* 234 U. S. 342, again in the field of transportation, but inevitably to add force and scope to the *Standard Oil* and *American Tobacco* rulings that manufacturing companies lay within the reach of the power and of the

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[10]See particularly the discussion in 317 U. S. at 119-120. See also *Prudential Ins. Co. v. Benjamin,* 328 U. S. 408; *South-Eastern Underwriters Assn. v. United States,* 322 U. S. 533; *Labor Board v. Jones & Laughlin,* 301 U. S. 1; *United States v. Darby,* 312 U. S. 100; *United States v. Wrightwood Dairy Co.,* 315 U. S. 110; Stern, The Commerce Clause and the National Economy, 1933-1946, 59 Harv. L. Rev. 645, 883.

The *Filburn* case dealt with the second Agricultural Adjustment Act and the power of Congress to enact it. But, referring to the first Interstate Commerce Act and the Sherman Act, the Court in the *Filburn* case (pp. 121-122) said that those statutes "ushered in new phases of adjudication" requiring a different approach to interpretation of the commerce clause, although "when it first dealt with this new legislation, the Court adhered to its earlier pronouncements, and allowed but little scope to the power of Congress." For the latter statement the *Knight* case was cited as the principal example.

statute, deriving no immunity for their conduct violative of the prohibitions merely from the fact of engaging in that character of activity.

With extension of the *Shreveport* influence to general application,[11] it was necessary no longer to search for some sharp point or line where interstate commerce ends and intrastate commerce begins, in order to decide whether Congress' commands were effective. For the essence of the affectation doctrine was that the exact location of this line made no difference, if the forbidden effects flowed across it to the injury of interstate commerce or to the hindrance or defeat of congressional policy regarding it.

The formulation of the *Shreveport* doctrine was a great turning point in the construction of the commerce clause, comparable in this respect to the landmark of *Cooley v. Board of Wardens,* 12 How. 299. For, while the latter gave play for state power to work in the field of commerce, the former broke bonds confining Congress' power and made it an effective instrument for fulfilling its purpose. The *Shreveport* doctrine cut Congress loose from the hal-

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[11]The doctrine encompassed fundamentally not merely an expanding factor in federal power over transportation. It was rather an integer in the sum of power over commerce, of which authority over transportation was but a part. The "affectation" approach was actually a revival of Marshall's "necessary and proper" doctrine, cf. *Wickard v. Filburn,* 317 U. S. 111, 120, 122, but unqualified by his idea of mutual exclusiveness, see note 8. Once applied to transportation and the Interstate Commerce Acts, it was inevitable that the approach would be extended to the productive and industrial phases of the national economy and the statutes regulating them, including the Sherman Act. Time and events were disclosing ever more clearly the impact of their effects upon interstate trade and commerce. And this was posing the same necessity for regulation as in the field of transportation, in order to protect and preserve the national commerce and carry out Congress' policy regarding it.

tering labels of "production" and "manufacturing" and gave it rein to reach those processes when they were used to defy its purposes regarding interstate trade and commerce. In doing so the decision substituted judgment as to practical impeding effects upon that commerce for rubrics concerning its boundaries as the basic criterion of effective congressional action.

The transition, however, was neither smooth nor immediately complete, particularly for applying the Sherman Act. The old ideas persisted in specific applications as late as the 1930's. But after the historic decisions of 1911, and even more following the *Shreveport decision,* a constantly growing number of others rejected the idea that production and manufacturing are "purely local" and hence beyond the Act's compass, simply because those phases of a combination restraining or monopolizing trade were carried on within the confines of a single state or, of course, of several states.[12] The struggle for supremacy between the conflicting approaches was long continued. But more and more until the climax came in the late 1930's, this Court refused to decide those issues of power and coverage merely by asking whether the restraints or monopolistic practices, shown to have the forbidden effects on commerce, took place in a phase or

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[12]*United States v. Reading Co.,* 253 U. S. 26; *United States v. Keystone Watch Case Co.,* 218 F. 502; *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.,* 166 F. 254; *United States v. E. I. Du Pont de Nemours & Co.,* 188 F. 127. See Mr. Justice Holmes dissenting in *Hammer v. Dagenhart,* 247 U. S. 251, 279.

phases of the total economic process which, apart from other phases and from the outlawed effects, occurred only in intrastate activities.[13]

In view of this evolution, the inquiry whether the restraint occurs in one phase or another, interstate or intrastate, of the total economic process is now merely a preliminary step, except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented.[14] For, given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence. If so, the restraint must fall, and the injuries it inflicts upon others become remediable under the Act's prescribed methods, including the treble damage provision.

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[13]*Montague & Co. v. Lowry,* 193 U. S. 38; *Swift & Co. v. United States,* 196 U. S. 375; *United States v. Patten,* 226 U. S. 525; *Binderup v. Pathe Exchange,* 263 U. S. 291; *Federal Trade Commission v. Pacific Paper Assn.,* 273 U. S. 52; *Stevens Co. v. Foster & Kleiser Co.,* 311 U. S. 255; *Bigelow v. RKO Radio Pictures,* 327 U. S. 251.

[14]In *United States v. Frankfort Distilleries,* 324 U. S. 293, 297, we said: "It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce." The decisions cited were *Industrial Association of San Francisco v. United States,* 268 U. S. 64; *Levering & Garrigues Co. v. Morrin,* 289 U. S. 103; *United Leather Workers v. Herbert & Meisel Trunk Co.,* 265 U. S. 457; cf. *Local 167 v. United States,* 291 U. S. 293, 297, and *United States v. Hutcheson,* 312 U. S. 219.

The *Shreveport* doctrine did not contemplate that restraints or burdens become or remain immune merely because they take place as events prior to the point in time when interstate commerce begins. Exactly the contrary is comprehended, for it is the effect upon that commerce, not the moment when its cause arises, which the doctrine was fashioned to reach.

Obviously therefore the criteria respondent would have us follow furnish no basis for reaching the result it seeks. Only by returning to the *Knight* approach, and severing the intrastate events relating to the beets, including the price restraints, from the later events relating to the sugar, including its interstate sale, could we conclude there were no forbidden restraints or practices touching interstate commerce here. At that late day we are not willing to take that long backward step.

III.

We turn then to consider the questions posed upon the amended complaint that are relevant under the presently controlling criteria. These are whether the allegations disclose a restraint and monopolistic practices of the types outlawed by the Sherman Act; whether, if so, those acts are shown to produce the forbidden effects upon commerce; and whether the effects create injury for which recovery of treble damages by the petitioners is authorized.

It is clear that the agreement is the sort of combination condemned by the Act,[15] even though the price-fixing was

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[15] *United States v. Frankfort Distilleries,* 324 U. S. 293, and authorities cited.

by purchasers,[16] and the persons specially injured under the treble damage claim are sellers, not customers or consumers.[17] And even if it is assumed that the final aim of the conspiracy was control of the local sugar beet market, it does not follow that it is outside the scope of the Sherman Act. For monopolization of local business, when achieved by restraining interstate commerce is condemned by the Act. *Stevens Co. v. Foster & Kleiser,* 311 U. S. 255, 261. And a conspiracy with the ultimate object of fixing local retail prices is within the Act, if the means adopted for its accomplishment reach beyond the boundaries of one state. *United States v. Frankfort Distilleries,* 324 U. S. 293.

The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. Cf. *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150; *American Tobacco Co. v. United States,* 328 U. S. 781. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated. Cf. *United States v. South-Eastern Underwriters Assn., supra,* at 553.

Nor is the amount of the nation's sugar industry which the California refiners control relevant, so long as control

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[16]Cf. *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150; *American Tobacco Co. v. United States,* 328 U. S. 781; *United States v. Patten,* 226 U. S. 525; *Swift & Co. v. United States,* 196 U. S. 375. Each case involved outlawed practices by persons who were both purchasers and sellers, and forbidden effects upon sellers as well as purchasers and consumers.

[17]See note 16.

is exercised effectively in the area concerned, *Indiana Farmer's Guide v. Prairie Farmer,* 293 U. S. 268, 279, *United States v. Yellow Cab Co.,* 332 U. S. 218, 225, the conspiracy being shown to affect interstate commerce adversely to Congress' policy. Congress' power to keep the interstate market free of goods produced under conditions inimical to the general welfare, *United States v. Darby,* 312 U. S. 100, 115, may be exercised in individual cases without showing any specific effect upon interstate commerce, *United States v. Walsh,* 331 U. S. 432, 437-438, it is enough that the individual activity when multiplied into a general practice is subject to federal control, *Wickard v. Filburn, supra,* or that it contains a threat to the interstate economy that requires preventive regulation. *Consolidated Edison Co. v. Labor Board,* 305 U. S. 197, 221-222.

Moreover, as we said in the *Frankfort Distilleries* case, ". . . there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states." 324 U. S. 293, 297. That statement is as true of the situation now presented as of the one then before us, although instead of restraining trade in order to control a local market petitioners control a local market in which they purchase. For this is not a case involving only "a course of conduct wholly within a state"; it is rather one involving "conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states," and in such a case it is not material that the source of the forbidden effects upon that commerce arises in one phase or another of that program.

In view of all this, it is difficult to understand respondent's argument that the complaint does not allege that the conspiracy had any effect on interstate commerce, except on the basis of the discarded criteria discussed in Part II above. The contention ignores specific allegations which we have set forth. But apart from that fact it rests only on a single grounding, which in the circumstances of this case is little, if any, more than a different phrasing of the criteria supplanted by the *Shreveport* approach.

This is that the change undergone in the manufacturing stage when the beets are converted into sugar makes the case different, for the Sherman Act's objects, than it would be if the identical commodity were concerned from the planting stage through the phase of interstate distribution, *e. g.,* if the commodity were wheat, as was true in *Wickard v. Filburn, supra,* or raisins purchased by packers from growers and shipped interstate after packing, cf. *Parker v. Brown,* 317 U. S. 341, 350.

We do not stop to consider specific and varied situations in which a change of form amounting to one in the essential character of the commodity takes place by manufacturing or processing intermediate the stages of producing and disposing of the raw material intrastate and later interstate distribution of the finished product; or the effects, if any, of such a change in particular situations unlike the one now presented.[18] For mere change in the form of the commodity or even complete change in

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[18]Compare *Arkadelphia Milling Co. v. St. Louis Southwestern R. Co.,* 249 U. S. 134, with *Cloverleaf Butter Co. v. Patterson,* 315 U. S. 148.

essential quality by intermediate refining, processing or manufacturing does not defeat application of the statute to practices occurring either during those processes or before they begin, when they have the effects forbidden by the Act.[19] Again, as we have said, the vital thing is the effect on commerce, not the precise point at which the restraint occurs or begins to take effect in a scheme as closely knit as this in all phases of the industry. Hence in this case the mere fact that the price fixing related directly to the beets did not sever or render insubstantial its effect subsequently in the sale of sugar.

Indeed that severance would not necessarily take place if the manufacturing stage had produced a much greater change in commodities than was effected here. But under the facts characterizing this industry's operation and the tightening of controls in this producing area by the new agreements and understandings, there can be no question that their restrictive consequences were projected substantially into the interstate distribution of the sugar, as the amended complaint repeatedly alleges. Indeed they permeated the entire structure of the industry in all its phases, intrastate and interstate.

We deal here, as petitioners say, with an industry tightly interwoven from sale of the seed through all the intermediate stages to and including interstate sale and distribution of the sugar. In the middle of all these processes and dominating all of them stand the refiners. They control the supply and price of seed, the quantity sold and the volume of land planted, the processes of cultiva-

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[19] *Swift & Co. v. United States,* 196 U. S. 375; *American Tobacco Co. v. United States,* 328 U. S. 781; *United States v. Aluminum Co. of America,* 148 F. 2d 416.

tion and harvesting, the quantity of beets purchased and rejected, the refining, and the distribution of sugar both interstate and local.

Some of these controls have been built up by taking advantage of the opportunities afforded by the industry's unique character, both natural and in its general pattern and habits of organization;[20] others by utilizing the key positions these advantages give the refiners to put contractual restraints upon the growers by their separate actions;[21] and still greater ones by the refiners' ability, by virtue of their central and dominating place thus achieved, to agree among themselves upon further restrictions.

Even without the unifom price provision and with full competition among the three refiners, their position is a dominating one. The growers' only competitive outlet is the one which exists when the refiners compete among themselves. There is no other market. The farmers'

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[20]The natural factors include the peculiar nature of the crop in its limitaiton to a single primary and commercially profitable use, the necessity for immediate and nearby marketing to follow directly upon harvesting, and the well-known fact that sugar beets are grown only in widely scattered regions specially adapted to the crop in soil, climate and availability of water in large quantities during the growing season.

[21]Resulting in large part from the natural limitations stated in note 20 and the fact that extracting the sugar content from the beets is an elaborate and technical process, is the further important fact that the processing cannot be done by the growers individually or even in small cooperative groups, but requires specialized and large scale business organization, equipment and investment. All these factors and perhaps others combine to make the refining stage of the industry a specialized manufacturing one to be carried on separately from growing, to establish the refiners' key place in the entire industry, and thus to leave the growers completely at the refiners' mercy for the profitable production of beets except as the latter may compete among themselves.

only alternative to dealing with one of the three refiners is to stop growing beets. They can neither plant or sell except at the refiners' pleasure and on their terms. The refiners thus effectively control the quantity of beets grown, harvested and marketed, and consequently of sugar sold from the area in interstate commerce, even when they compete with each other. They dominate the entire industry. And their dominant position, together with the obstacles created by the necessity for large capital investment and the time required to make it productive, makes outlet through new competition practically impossible. Upon the allegations, it is absolutely so for any single growing season. A tighter or more all-inclusive monopolistic position hardly can be conceived.

When therefore the refiners cease entirely to compete with each other in all stages of the industry prior to marketing the sugar, the last vestige of local competition is removed and with it the only competitive opportunity for the grower to market his product. Moreover it is inconceivable that the monopoly so created will have no effects for the lessening of competition in the later interstate phases of the over-all activity or that the effects in those phases will have no repercussions upon the prior ones, including the price received by the growers.

There were indeed two distinct effects flowing from the agreement for paying uniform growers' prices, one immediately upon the price received by the grower rendering it devoid of all competitive influence in amount; the other the necessary and inevitable effect of that agreement in the setting of the industry as a whole, to reduce competition in the interstate distribution of sugar.

The idea that stabilization of prices paid for the only raw material consumed in an industry has no influence

toward reducing competition in the distribution of the finished product, in an integrated industry such as this, is impossible to accept. By their agreement the combination of refiners acquired not only a monopoly of the raw material but also and thereby control of the quantity of sugar manufactured, sold and shipped interstate from the northern California producing area. In substance and roughly, if not precisely, they allocated among themselves the market for California beets substantially upon the basis of quotas competitively established among them at the time the uniform price arrangement was agreed upon. It is hardly likely that any refiner would have entered into an agreement with its only competitors, the effect of which would have been to drive away its growers, or therefore that many of the latter would have good reason to shift their dealings within the closed circle. Thus control of quantity in the interstate market was enhanced.

This effect was further magnified by the fact that the widely scattered location of sugar beet growing regions and their different accessibilities to market[22] give the refiners of each region certainly some advantage over growers and refiners in other regions, and undoubtedly large ones over those most distant from the segment of the interstate market served by reason of being nearest to hand.

Finally, the interdependence and inextricable relationship between the interstate and the intrastate effects of the combination and monopoly are shown perhaps most clearly by the provision of the uniform price agreement

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[22]See note 20.

which ties in the price paid for beets with the price received for sugar. The percentage factor of interstate receipts from sugar which the grower's contract specifies shall enter his price for beets makes that price dependent upon the price of sugar sold interstate. The uniform agreement's effect, when added to this, is to deprive the grower of the advantage of the individual efficiency of the refiner with which he deals, in this case the most efficient of the three, and of the price that refiner receives. It is also to reflect in the grower's price the consequences of the combination's effects for reducing competition among the refiners in the interstate distribution of sugar.

In sum, the restraint and its monopolistic effects were reflected throughout each stage of the industry, permeating its entire structure. This was the necessary and inevitable effect of the agreement among the refiners to pay uniform prices for beets, in the circumstances of this case. Those monopolistic effects not only deprived the beet growers of any competitive opportunity for disposing of their crops by the immediate operation of the uniform price provision; they also tended to increase control over the quantity of sugar sold interstate; and finally by the tie-in provision they interlaced those interstate effects with the price paid for the beets.

These restrictive and monopolistic effects, resulting necessarily from the practices alleged intended to produce them, fall squarely within the Sherman Act's prohibitions, creating the very injuries they were designed to prevent, both to the public and to private individuals.

It does not matter, contrary to respondent's view, that the growers contracting with the other two refiners may have been benefited, rather than harmed, by the combi-

nation's effects, even if that result is assumed to have followed. It is enough that these petitioners have suffered the injuries for which the statutory remedy is afforded. For the test of the legality and immunity of such a combination, in view of the statute's policy, is not that some others than the members of the combination have profited by its operation. It is rather whether the statute's policy has been violated in a manner to produce the general consequences it forbids for the public and the special consequences for particular individuals essential to the recovery of treble damages. Both types of injury are present in this case, for in addition to the restraints put upon the public interest in the interstate sale of sugar, enhancing the refiner's controls, there are special injuries affecting the petitioners resulting from those effects as well as from the immediate operation of the uniform price arrangement itself.

The fact that that arrangement is the source of both effects cannot be taken to mean that neither is outlawed by the statute, in view of their interdependence and the completely unified and comprehensive nature of the scheme as respects its interstate and intrastate phases. The policy of the Act is competition. It cannot be flouted, as has been done here, by artificial nomenclatural severance of the plan's forbidden effects, any more than by such segmentation of the integrated industry into legally unrelated phases. Nor can the severance be made in such a case merely by virtue of the fact that a refining or manufacturing process constitutes an intermediate stage in the whole.

To compare an industry so completely interlocked in all its stages, by all-inclusive contract as well as by industrial structure and organization, with one like producing,

processing, and marketing fruits, vegetables, corn, or other products, susceptible of various uses and under conditions affording varied outlets for market, both local and interstate, in the raw or refined state, in which neither such a contractual nor such an industrial integration exists, is to ignore the facts of industrial life. So is it also to make conclusive comparisons with other industries in which the manufacturing process requires and has available a greater variety of raw materials for making the finished product, and involves a longer and more extensive process of change, than does extracting the sugar content of beets to make raw sugar.

We deal with the facts before us. With respect to others which may be significantly different, for purposes of violating the statute's terms and policy, we await another day.[23]

IV.

Little more remains to be said concerning the amended complaint. The allegations comprehend all that we have set forth. We do not stop to restate them, leaving their substance at this point for reference to the summary made at the beginning of this opinion.

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[23]It is suggested that *Parker v. Brown*, 317 U. S. 341, is inconsistent with our conclusion here. The Court there held first that the Sherman Act did not apply because the program was sponsored by the State of California. Contrary to the present suggestion, the opinion assumes that the relation between the intrastate and the interstate commerce in raisins was sufficient to justify federal regulation, if the state-sponsored program of prorating had been "organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate." 317 U. S. at 350. The case therefore contains no suggestion, on the facts or on the law, contrary to the result now reached.

Respondent has presented its argument as if the amended complaint omitted all reference to restraint or effects upon interstate trade in sugar and confined these allegations to the trade in beets. It is true that at the hearing which followed filing of the amended complaint, petitioners at one point, apparently in response to some intimation from the court, eliminated the words "sugar and sugar beets" from one of the allegations that the refiners had conspired to "monopolize and restrain trade and commerce among the several states . . ."[24]

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[24]See note 5. By way of explaining the deletion, the record contains only the statement of the stipulation, cf. note 1, that the amended complaint eliminated "what the Court considered an ambiguity in the [original] complaint." With no further support from the record, it has been assumed that the ambiguity so elided was the reference to restraint of interstate trade in *sugar* and hence the petitioners in making it stated themselves out of court.

Apart from the fact that the elision did not affect numerous other like allegations, see note 6 and text, the deletion included the specifications of both "sugar and sugar beets." From this the literal inference, if any of the sort could be made, would be that the elision was intended to withdraw all charges of monopoly or restraint of trade, whether in sugar or in beets, and thus to concede there was no case under the Sherman Act, a conclusion obviously at war with the remaining allegations of restraint of trade in both sugar and sugar beets.

But, if any difference between the two could be assumed as having been intended, it is much more likely that the supposed ambiguity deleted arose from the reference to interstate trade in *beets,* since the allegation as a whole referred only to "interstate trade and commerce" and on the facts pleaded the only trade in beets was intrastate (considered apart, as respondent would do, from its relation to and effects upon the trade in sugar.)

In any event the case is to be decided upon the sum of the allegations of the amended complaint, not upon conjecture as to why a particular and, we think, immaterial amendment of one allegation was made. Indeed the entire allegation could have been elided without affecting the substance or validity of the remainder of the amended complaint to state a cause of action under the Sherman Act. There was more than enough without it.

Respondent takes this elision as effective to constitute an express disavowal by petitioners of any charge of restraint of trade in sugar, the only interstate commodity. The amendment did not eliminate or affect numerous other allegations which in effect repeated the charge in various forms and with reference to various specific effects upon interstate as well as local phases of the commerce. Some of these explicitly specified trade or commerce in sugar,[25] others designated the trade affected as interstate, which on the facts could mean only sugar. Moreover, petitioners deny the disavowal, both in intent and in effect. They say the elision was insubstantial, since in the clause from which it was made the allegation of conspiracy to monopolize and restrain interstate commerce remained, and the only interstate trade was in sugar. We think the amendment, for whatever reason made, was not effective to constitute a disavowal, disclaimer or waiver.

The allegations are comprehensive and, for the greater part specific, concerning both the restraints and their effects. They clearly state a cause of action under the Sherman Act.

The judgment of the Circuit Court of Appeals is reversed, and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

Reversed and remanded.

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[25] *E. g.*, in the allegation quote in note 6, as well as others set forth in the text preceding that note.

[Title of District Court and Causes—4643-8353.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled cases having been duly consolidated for trial, came on regularly for trial and were tried before the Honorable Benjamin Harrison, United States District Judge, a jury having been waived by all parties. Plaintiffs appeared by Wood, Crump, Rogers and Arndt (by Stanley M. Arndt, Esq.), their attorneys, [386 and defendant appeared by O'Melveny and Myers (by Pierce Works, Esq., and John Whyte, Esq.), and by Donald S. Graham, Esq., its attorneys.

The complaint in action 8353 sought damages by Evans for the years 1939, 1940 and 1941. Defendant filed its motion to dismiss said complaint. Thereupon plaintiff in said action filed his amendment to his complaint pursuant to Rule 15-A of the Rules of Civil Procedure. Thereafter, by stipulation, said motion was heard as to the said complaint as amended and was granted by the court on the grounds of the statute of limitations as to the 1939 and 1940 crop years but was denied as to the 1941 crop year. The statute of limitations was suspended between Oct. 10, 1942 and June 30, 1946 by virtue of the amendment of 15 U.S.C. Sec. 16 passed Oct. 10, 1942 as amended June 30, 1945 (Acts of Congress, Oct. 10, 1942, Ch. 589, 56 Stat. 781; 59 Stat. 306; U. S. C. A. 1940 Ed. Supp. IV, p. 185; 15 U. S. C. A. 1949 Cumulative Annual Pocket Parts, Title 15, Sec. 16, p. 161.) The Evans suit was filed June 23, 1948. The applicable statute of limitations was three years under Sec. 338, Subd. 1, Code of Civil Procedure of California, plus the period during which the

statute was suspended as aforesaid, and the Evans suit was therefore barred as to any claims or cause of action arising prior to October 3, 1941. The Evans cause of action for the 1939 and 1940 crop years arose prior to Oct. 3, 1941, and was therefore barred. The court, for that reason, on Nov. 22, 1948, granted defendant's motion to dismiss the Evans action as to the claims and causes of action in said Evans action No. 8353 for the years 1939 and 1940 and denied it as to the year 1941. The Evans action 8353 was tried as to the year 1941 only, but action 4643 was tried as to the years 1939, 1940 and 1941. Action 4643 was commenced on July 30, 1945. The statute of limitations in said action 4643 was suspended at that time pursuant to said statute as amended, and had been suspended continuously from Oct. [387] 10, 1942 up to said date and had run in said action 4643 less than the statutory period as to each of the years 1939, 1940 and 1941 which ended July 31, 1940, July 31, 1941 and July 31, 1942 respectively.

The amended complaint in action 4643, as amended, contained three counts, the first being upon the Sherman Act, and the second and third being for an accounting. Plaintiffs stipulated that if judgment were rendered in their favor upon the first count, that the second and third counts would be functo officio and would not be pressed. Action 4643 was tried only on the first count or cause of action thereof as amended. Evidence both oral and documentary and various stipulations were received in evidence, and the parties having presented written briefs to the court, and the matter being duly submitted to court, and the court being fully advised in the premises, now makes its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

The Court finds that:

(A) In these findings and in the conclusions of law, defendant American Crystal Sugar Company will be called "Crystal", plaintiff Mandeville Island Farms, Inc. will be called "Mandeville", plaintiff R. C. Zuckerman will be called "Zuckerman", plaintiff G. K. Evans will be called "Evans", Spreckels Sugar Company will be called "Spreckels", Holly Sugar Corporation will be called "Holly", and Union Sugar Company will be called "Union."

(B) A crop year as referred to herein and in the conclusions of law, is from August 1st of any particular year to July 31st of the next calendar year and is commonly referred to herein by the year number of the calendar year in which it commences. The word "year" as hereinafter used refers to the crop year herein described.

(C) Certain stipulations of facts were entered into in writing [388] between the parties and received in evidence by and considered by the court. The court finds as true the facts stipulated to therein. The Court also finds as true the allegations of the amended complaint as amended in case 4643 and the complaint as amended in action 8353, admitted by or not denied by the answer or amended answer thereto.

1. The grounds upon which the jurisdiction of the court depends are: this is an action brought by persons injured in their business and property by reason of acts of the defendant forbidden in the anti-trust laws of the United States (15 U.S.C.A. Sec. 15), and brought in a district in which the defendant is found and has an agent

2. (a) Plaintiff Mandeville now is and at all times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business in Stockton, San Joaquin County, California.

(b) Defendant Crystal now is and at all times herein mentioned has been a corporation organized and existing under and by virtue of the laws of the State of New Jersey, with its principal office and place of business and executive departments in Denver, Colorado, and engaged in trade and commerce among the several states of the United States. At all times herein mentioned, said defendant has been and now is qualified to do and doing business in California and in the above entitled district thereof as a foreign corporation and is found in the above entitled district and division of California and in various other parts of California. Its agent designated for service of process under and by virtue of the law of the State of California regarding foreign corporations is J. W. Rooney, of Oxnard, Ventura County, in the above entitled district and division of California.

(c) Plaintiffs Zuckerman and Evans now are and at all [389] times herein mentioned have been citizens and inhabitants of the State of California and residents of San Joaquin County in said State.

3. (a) Plaintiffs Mandeville, Zuckerman and Evans assert rights herein to relief in respect of or arising out of a series of transactions in which common questions of law and common questions of fact arise and are involved. The said transactions involve agricultural contracts identical in practically all material matters and respects, for successive cropping seasons, each involving sugar beets to be grown in Contra Costa and San Joaquin Counties,

California, north of the 36th parallel and in the delta of the San Joaquin River system.

(b) Mandeville Island at all times herein mentioned contained large areas of land suitable in composition, drainage, irrigation, location, climate and transportation facilities for the commercial raising of sugar beets suitable for processing into sugar. During the crop years 1939, 1940 and 1941 herein mentioned, plaintiffs Mandeville and Zuckerman had respectively supplies, equipment, tools, personnel, labor, organization, and knowledge adequate for the commercial raising on Mandeville Island of sugar beets suitable for processing into sugar.

4. The matter in controversy in each suit herein exceeds, exclusive of the interest, costs and attorney fees, the sum of $3,000.00.

5. On Sept. 11, 1939, the Second World War broke out and thereafter and up to Dec. 7, 1941, the United States was in danger of being drawn into said conflict and was preparing its defense against its possible entry into said conflict. On Dec. 7, 1941 the Japanese attacked the United States at Pearl Harbor. This was followed by declaration of war between the United States and all the members of the Axis. At all times herein mentioned from Sept. 11, 1939, the sugar beet industry was and now is one of [390] the vital industries of the United States and the growing of sufficient sugar beets to provide for national demands and defense and for the beet sugar stock pile necessary for military purposes was a matter of national welfare. As a result, the United States Government rationed the use of sugar in the United States and said rationing still continued at the time of the filing of action 4643. The various steps involved in the production and sale of beet sugar in California during the years

here involved, including the growing of sugar beets, the harvesting thereof, the delivering of the beets to the manufacturer, are as set forth in Exhibits A, B, C and D as hereinafter set forth in Par. 7-C.

6. (a) That portion of California north of the 36th parallel is hereinafter referred to as "Northern California." That portion of California south of the 36th parallel is hereinafter referred to as "Southern California." A relatively few beet growers in California had farms slightly north of the 36th parallel and these were considered by the beet sugar refiners as being in Southern California, despite the fact that their farms were geographically slightly north of said parallel and they are herein considered as owning and operating farms and producing sugar beets in Southern California. During the crop years 1938 to 1942, both inclusive, large acreages of agricultural land in the United States, including portions of Northern California, Southern California, Utah, Colorado, Michigan, Idaho, Illinois and other states, were planted to sugar beets. Said sugar beets, when [391] harvested, were not sold in central markets as were potatoes, onions, corn, grain, fruit and berries, but were produced by growers under contract with manufacturers or processors and upon being harvested were delivered to these manufacturers and taken to the latter's beet sugar refineries where the sugar beets were manufactured by an elaborate process into sugar by said manufacturers, who thereafter sold the resulting sugar in interstate commerce. Said sugar beets, when harvested, were bulky and semi-perishable and incapable of being transported over long distances or of being stored cheaply or safely for any extended period. Said sugar beets, when ripe, deteriorated rapidly if kept in the ground and not harvested, and it was necessary to harvest them promptly when matured.

(b) From 1937 to 1942 inclusive, there were only four manufacturers owning or operating factories that manufactured sugar beets into sugar in California, to wit, Spreckels, Holly, Crystal and Union, although a fifth company, Los Alamitos Sugar Company, (hereinafter called "Alamitos") signed contracts with growers in Southern California. It did not own or operate its own plant. All of Spreckels' California factories were north of the 36th parallel; all of Union's factories in California were south of the 36th parallel; Holly and Crystal each had factories both north and south of said 36th parallel. The only practical market available to growers of sugar beets in Northern California during said period was sale to one of the three manufacturers that operated one or more beet sugar refineries in said district. Defendant was one of said three manufacturers. The initial outlay for the construction of a beet sugar refinery was so great, the annual upkeep and operating expenses were so large, and the time involved in erecting and equipping a beet sugar refinery so long that no competition from any new refinery could be expected within a given crop year, even if the necessary material and equipment priorities could be secured. During all of said period [392] said three manufacturers of sugar beets had a complete monopoly of the supply of sugar beet seeds and in the manufacture of sugar beets into sugar in California north of the 36th parallel and owned and controlled all sugar beet factories in said area of California which manufactured sugar beets into sugar, and the only practical market available to growers of sugar beets in Northern California, during said period, was sale to one of said manufacturers. A like monopoly was held by Crystal, Holly, Union and Alamitos in Southern California during the said period.

(c) The sugar manufactured from said beets was, during all of said period, sold in interstate commerce throughout the United States. The beets, however, including the beets purchased from plaintiffs during 1939, 1940 and 1941, all as hereinafter found, were planted, grown, harvested and processed into sugar wholly within the State of California.

(d) After sugar had or has been produced from sugar beets, it was impossible to distinguish the manufactured beet sugar manufactured from sugar beets grown in any one part of the United States from that manufactured from sugar beets grown in any other part of the United States, or beet sugar refined in one refinery from that refined in another refinery.

(e) During said period, the only sugar beet seeds commercially available in California were those securable from one of said manufacturers and the only method of sale of marketable sugar beets available to growers of sugar beets in California was by sale to one of the said manufacturers under standard form printed contracts prepared by the manufacturers, whereby the price to be paid by the manufacturers to the grower of sugar beets was determined for beets of a given sugar content by the net price received from the sale in interstate commerce of the sugar manufactured from the sugar beets delivered by the various growers to the manufacturers. A grower who did not enter into one of said standard forms of contract could not get seed from any source and was unable to grow any sugar beets.

7. (A) In and by said standard contract, the grower [393] agreed (a) to plant a specified acreage to sugar beets with seed furnished by the manufacturers to the grower at grower's cost, (b) to cultivate said land after

the same had been planted and to care for and harvest the sugar beets, and (c) to deliver the beets so harvested to the manufacturers. The manufacturer agreed in and by said contract (a) to accept delivery of said sugar beets from the grower, except that the manufacturer had the right to reject any beets that were diseased, wilted or not suitable for the manufacturer of sugar, (b) to manufacture into sugar the sugar beets accepted by it, (c) to make on the 15th day of each month an advance payment for the sugar beets delivered during the preceding month, based on the estimate made by the manufacturer of the sugar sold and to be sold which had been manufactured from beets produced by the grower and other growers under like contracts, and (d) to make final (in point of time) payment for all beets on or before August 31st of the next crop year, the price to be paid for said beets to be determined by the sugar content of the beets of the individual grower and the net return received from the sale of the manufactured sugar in interstate commerce.

(B) The contracts that were used in California during the years 1937 to 1942, were often called the "50-50" contracts. They were based upon a formula which was supposed to provide for the retention by the company of approximately one-half (50%) of the net return of the sale of the sugar produced from said beets and payment of approximately one-half (50%) of said net return to the grower, as the purchase price of the beets.

(C) Attached to the amended complaint in action 4643 as Exhibits A, B, C and D are true copies of Crystal's Northern California contracts for 1938, 1939, 1940 and 1941. Attached to the Amendment to Answer to First Amended Complaint, as amended, in action 4643 as Exhibits 1 to 19, are true copies of the contracts of Holly,

Union, Alamitos and Crystal in force in [394] Southern California during the crop years 1939, 1940 and 1941 during the respective years and by the respective companies designated in said respective contracts.

8. Prior to the crop season of 1939 and subsequent to the crop season of 1941, the net return from the sale of manufactured sugar in Northern California was determined under the various contracts by the net return from the sale of sugar manufactured in the beet sugar factory or factories of the particular contracting manufacturer from beets delivered to said manufacturer by the grower and other growers in the same area during the particular crop season, in accordance with the schedule set forth in the standard contract. Exhibit "A" to the amended complaint in action 4643 is a copy of the standard Crystal Northern California contract for the crop year 1938. But during the crop years 1939, 1940, 1941 and pursuant to the conspiracy hereinafter referred to, the standard printed contract as used by all of said manufacturers in Northern California, provided that the net return used as a basis for the prices to be paid the grower was the average net return of all refineries manufacturing beet sugar north of the 36th parallel in California and not the net return of the particular manufacturer or particular refiners with whom the grower contracted and to whom the beets were delivered and by whom or which the beets were manufactured into sugar. During the years 1939, 1940 and 1941, all growers of sugar beets in California were paid upon an average net return basis. During said years growers in Southern California were paid on the average net return of the Southern California factories and growers in Northern California were paid on the average net return of Northern California factories. While contracts in different areas of California differed

in the schedules used, they all had substantially the same terms and within a given area in California, all growers during 1939, 1940 and 1941 were paid during said years, the same price for beets of a given sugar content, regardless of [395] with which company the grower dealt or where their beets were manufactured into sugar.

9. Some time in 1938, at a time unknown to plaintiffs but particularly within the knowledge of defendant, but which defendant did not disclose to the plaintiffs or to the court, said defendant illegally and wrongfully entered into a conspiracy with each and every one of the other manufacturers of sugar in California whose plants were located north of the 36th parallel, to monopolize and restrain trade and to unlawfully fix prices to be paid the growers of sugar beets, and, as a part of said conspiracy, said defendant and said two other manufacturers (Holly and Spreckels) agreed among themselves to do and did among other things during the crop years 1939, 1940 and 1941, the following:

(a) Each no longer competed against any of the others as to the price to be paid the growers for sugar beets raised in Northern California;

(b) Each paid the same price to growers of sugar beets in Northern California, to-wit: the price determined upon the average net returns from the sale of all sugar sold in interstate commerce from the factories of said conspirators north of the 36th parallel in California during that crop year and did not pay the growers upon the net returns from the sale of sugar sold from the Northern California factory or factories of the particular manufacturer to whom the particular grower was under contract;

(c) Each no longer competed with the others, but instead, and regardless of the efficiency or lack of efficiency

of the sales or manufacturing organizations of any of the conspirators, and regardless of the price at which sugar was sold from any particular refinery or from any particular manufacturer's refinery or refineries, or by any particular manufacturer, paid all growers of sugar beets in Northern California the same price [396] for the same amount of beets of the same sugar content. A similar method of paying growers on an average net return was used throughout Southern California during the same period;

(d) They did not pay the growers of sugar beets a reasonable price for their beets. Each of said conspirators sold seeds to, entered into contracts with and bought beets only from growers who signed a standard printed form of contract prepared by said manufacturers and practically identical in all material terms. Farmers contemplating or desirous of growing sugar beets in Northern California either signed such a contract with one of said conspirators or could not get seeds to plant sugar beets or a practical market to sell their marketable beets. A similar method was used during said years throughout Southern California;

(e) Said prices agreed upon by defendant and its conspirators to be paid by them and paid by them to plaintiffs and other sugar beet growers in Northern California during said period, are set forth in said Exhibits "B", "C" and "D" and were and are not the reasonable prices for sugar beets.

10. Prior to the 1939 crop season, the various manufacturers of sugar in Northern California, including defendant, competed in interstate commerce with each other as to the performance, ability and efficiency of their manufacturing, sales and executive departments, and each strove

to increase sales return and decrease sales expenses and to operate as efficiently as possible in order to increase the unit return to growers of sugar beets under said standard contract and thus to attract beet growers to sign contracts with them. During the crop year of 1938, the net receipts of sales of sugar (less allowances, federal excise taxes, freight to destination, and cash discounts to customers) secured by defendant per 100 pounds were greater than the average net receipts of the other manufacturers of beet sugar in Northern California. As a result thereof, during the crop year 1938, sugar beet growers in Northern California, north of the [397] 36th parallel, who had contracted with defendant, received on the average from 28 cents to 50 cents per ton more for sugar beets delivered to defendant corporation under said standard contract than did growers of beets of identical sugar content delivered to the other manufacturers of beet sugar in Northern California.

11. During said crop seasons of 1939, 1940 and 1941, as a direct result of said conspiracy, expected and planned by said conspirators, there was no longer competition between the conspirators as had previously existed in their purchase of sugar beets.

12. As a direct, expected and planned result of said conspiracy, the free and natural flow in the purchase of sugar beets was intentionally hindered and obstructed. As a further direct, expected and planned result of said conspiracy, said three manufacturers operated, in so far as the growers' returns were concerned, as if they were one corporation owning and controlling all sugar beet factories in Northern California but with three completely separate overheads and selling expenses.

13. Said conspiracy continued throughout the crop years of 1939, 1940 and 1941, and until August 31, 1942, when the last payment was made under the 1941 standard contract. Defendant [398] Crystal has made payments for 1939, 1940 and 1941 beets to growers only in accordance with the method agreed upon by said conspirators as above set forth.

14. On December 2, 1940, Secretary of Agriculture of the United States, after due notice to all interested parties (including defendant and all other manufacturers of sugar in California) and after public hearings duly held and after investigations duly made, did, pursuant to Section 301d of said Sugar Act (7 U. S. C. A. 1131 (d)), make the determination of the fair and reasonable price for the 1940 and 1941 crops of sugar as set forth in par. XIV of the amended complaint. Defendant took part in said hearings held by the Secretary of Agriculture, and knew of the determination, but persisted thereafter in said conspiracy and would not buy beets from growers in Northern California except under the terms and conditions set forth in said standard agreement.

15. On November 14, 1938, defendant and plaintiff Mandeville entered into one of defendant's standard form contracts for the 1939 crop season under which defendant promised to pay said plaintiff on August 31, 1940, for the sugar beets delivered thereunder. Said plaintiff performed each and every term, condition and covenant on its part to be performed in said contract and during the crop year 1939 delivered to defendant 22,355.6 tons of sugar beets of an average sugar content of 18.25 per cent from Mandeville Island, which beets were accepted by defendant and manufactured by it into sugar.

16. On Dec. 29, 1939, defendant and plaintiff Mandeville entered into one of defendant's standard form contracts for the 1940 crop season under which defendant promised to pay said plaintiff on Aug. 31, 1941 for the sugar beets delivered thereunder. Said plaintiff performed each and every term, condition and covenant on its part to be performed in said contract and during the crop year 1940 delivered to defendant 25,430.3 [399] tons of sugar beets of an average sugar content of 15.55 per cent from said Mandeville Island, which beets were accepted by defendant and manufactured into sugar.

17. (A) On June 23, 1941 defendant and plaintiff Zuckerman entered into one of defendant's standard form contracts for the 1941 crop season under which defendant promised to pay plaintiff on Aug. 31, 1942 for the sugar beets delivered thereunder. Said plaintiff performed each and every term, condition and covenant on its part to be performed in said contract and during the crop year 1941 delivered to defendant 14,144.7 tons of sugar beets of an average sugar content of 15.47 per cent from said Mandeville Island, which beets were accepted by defendant and manufactured by it into sugar. Said plaintiff does not know when said sugar beets were manufactured into sugar by defendant.

(B) Plaintiff Evans, and defendant, on Dec. 23, 1940, entered into defendant's standard form contract for the 1941 crop season. Attached to the Evans complaint in action 8353 as Exhibit "D" is a true and correct copy of said contract. Plaintiff Evans performed each and every term, condition and covenant on his part to be performed in said contract and delivered to defendant 4,401.7 tons of beets thereunder, yielding 17.53 per cent

sugar, which beets were accepted by defendant and manufactured by it into sugar. Said contract covered Camps 5, 6 and 7 of American Island, Contra Costa County, California, which at all times herein mentioned were areas of land located in Northern California, suitable in composition, drainage, irrigation, location, climate and transportation facilities for the commercial raising of sugar beets suitable for processing into sugar. At all times herein mentioned said plaintiff had supplies, equipment, tools, personnel, labor, organization and knowledge adequate for the commercial raising on said areas of sugar beets suitable for processing into raw sugar. [400]

18. (A) Defendant during the crop years 1939, 1940 and 1941, operated sugar factories in Clarksburg (Northern California), Oxnard, Ventura County (Southern California), in the Arkansas Valley in Colorado, and elsewhere in other states of the United States. Sales of all of such sugar were directed by the President of the company during said three-year period from the head office at Denver, Colorado. Holly also operated sugar factories in Northern California, Southern California and in the Arkansas Valley in Colorado. During said crop years, 1939 to 1941, pursuant to said agreements made between them, Holly and Crystal paid their growers upon a joint net return basis. In Northern California and in Southern California the joint net return included all of the manufacturers of sugar within said respective areas; but in the Arkansas Valley it included two of the three manufacturers there located (Holly and Crystal) and did not include the third factory there located, the one operated by National Sugar Manufacturing Company.

(B) Substantial quantities of beets produced by plaintiff as aforesaid and delivered to defendant in said years,

were by defendant shipped to defendant's sugar factory in Southern California, located at Oxnard where said beets were manufactured into sugar by defendant. Said beets, when they reached the said Southern California factory of defendant at Oxnard, were mingled with beets raised by various Southern California growers and manufactured into sugar and it was, and at all times it has been impossible to differentiate the sugar manufactured from plaintiffs' beets from that manufactured from beets grown in Southern California.

(C) The reasonable prices for the sugar beets delivered by the plaintiffs to defendants for the years here involved were:

1. For the crop year 1939, [401] $15,749.51 more than Mandeville received from Crystal.

2. For the crop year 1940, $14,321.61 more than Mandeville received from Crystal.

3. For the crop year 1941, not less than $3,528.00 more than Zuckerman received from Crystal; and $1,-100.00 more than Evans received from Crystal.

(D) Had it not been for said plan and conspiracy and if plaintiffs had received the reasonable value of their sugar beets in a market unfettered and unhampered by said combination, plan and conspiracy, Mandeville Island Farms, Inc. would have received $30,071.12 more and plaintiff Roscoe C. Zuckerman would have received $3,-528.00 more and plaintiff Evans would have received $1,100.00 more than each did receive under said contracts and each of said plaintiffs respectively sustained damages accordingly, none of which damages have been paid. These amounts as found herein are on the conservative side.

19. By reason of the foregoing acts of the defendant and its said conspirators, the price of sugar beets was illegally fixed, and an illegal monopoly was established, to the damage of plaintiffs as aforesaid.

20. Plaintiffs, in order to enforce their rights against the defendant, employed the services of attorneys at law, and, under the anti-trust laws of the United States (15 U. S. C., Sec. 15), are entitled to reasonable attorney fees. The reasonable value [402] of the attorney fees performed up to the time of the judgment herein is $25,000.00.

21. From Oct. 10, 1942 to June 30, 1945, the statute of limitations applicable to the within set forth violations of the anti-trust laws of the United States was suspended by reason of the amendments of 15 U. S. C. Sec. 16, passed on Oct. 10, 1942, and amendments thereto (Acts of Congress Oct. 10, 1942, Ch. 589; 56 Stat. 781, U. S. C. 1940 ed., Sup. IV, p. 185; U. S. C. 1844 Cum, An. P. P. Title 15, Sec. 16, p. 76), which was in full force and effect between Oct. 10, 1942 and June 30, 1945.

22. (a) With reference to action 4643, the amended complaint, and the first count of the amended complaint as amended by "Amendment to First Amended Complaint" and the first count of the amended complaint as amended by said amendment and as further amended by "Amendment to First Amended Complaint", each state a claim upon which relief can be granted for the years 1939, 1940 and 1941.

(b) With reference to action 8353, the complaint and the complaint as amended by "Amendment to Complaint" and the complaint as so amended and as further amended by "Amendment to Complaint" filed Mar. 1, 1949, each

state a claim upon which relief can be granted for the year 1941.

23. It is not true that any of the claims, causes of action and demands of Mandeville for 1939 and 1940, or Zuckerman or Evans for 1941, hereinabove set forth, are barred by the provisions of Subd. 1 of Sec. 337 of the Code of Civil Procedure of California, nor by the provisions of Sec. 343 of said code, nor by the provisions of Subd. 1 of Sec. 338 of said code, nor by the provisions of Subd. 4 of Sec. 338 of said code, nor by the provisions of Subd. 1 of Sec. 339 of said code, nor by the provisions of Subd. 1 of Sec. 340 of said code.

24. It is not true that the defense of pari delicto is [403] applicable to any of the plaintiffs herein. It is not true that any of the plaintiffs herein aided or abetted in the consummation of the combination and conspiracy hereinabove referred to or knowingly participated therein. None of the plaintiffs was a party of the said monopoly, combination or conspiracy. None of the plaintiffs was in pari delicto with the defendant or any of the other conspirators. Plaintiff accepted and signed the joint return contracts for 1939, 1940 and 1941 for the reason that otherwise they could not secure sugar beet seed or sell their beets or engage in the business of growing sugar beets at a profit. Each of them entered into said contract because of a business necessity. None of them knowingly or wilfully helped to build up the said monopoly. The plaintiffs were members of a class for whose protection the said statute was enacted. Mandeville entered into a contract with Crystal in 1937 for the 1938 crop at a time when Crystal was not a party to any illegal agreement or monopoly in restraint of trade. Mandeville had

purchased Mandeville Island from Empire Farms Co., which had previously sold beets to Crystal. Crystal owned a beet dump on Mandeville Island which is geographically an island and there was no other beet dump on Mandeville Island. As a result of a flood, Mandeville's 1938 crop was destroyed, leaving Mandeville indebted to Crystal in a large sum of money which was secured by a crop mortgage not only on that crop but also on crops thereafter grown until the debt was paid off. Mandeville continued to be indebted to Crystal from that time until 1944 and was indebted to Crystal at all times during the conspiracy. Evans had also dealt with Crystal prior to the conspiracy and was indebted to Crystal at all times during the conspiracy. Furthermore, Evans was a tenant of Crystal and could not have dealt with either of the other two refiners.

25. At no time have plaintiffs or any of them abandoned, waived, released, surrendered or given up in any way any of their claims or causes of action hereinabove set forth, nor have plaintiffs or any of them intended so to do. [404]

Conclusions of Law.

From the findings of fact hereinabove set forth the Court herein makes the following Conclusions of Law relative thereto:

1. All conclusions of law that are set forth in the findings of fact are incorporated by reference herein as though here set forth in full.

2. This Court has jurisdiction of the parties and of the subject matter.

3. Prior to the crop year 1939, defendant wrongfully and unlawfully entered into, and during the crop years

1939, 1940 and 1941 remained and operated under, a combination and conspiracy which was in restraint of trade and commerce among the several states and wrongfully and unlawfully conspired with other persons to monopolize part of the trade and commerce among the several states, in violation of and contrary to the Sherman Anti-Trust Act of the United States (26 Stat. 209, 38 Stat. 731, 15 U. S. C. Secs. 1, 2, 7, 15) and did and performed acts forbidden by said Act. Plaintiffs are persons injured in their businesses and property by said acts of defendant by reason of the defendants doing said things forbidden by said Act. These conclusions of law are in accordance with the law as held by the decision of the Supreme Court of the United States heretofore made in the Mandeville case No. 4643 (334 U. S. 219), which decision is binding upon this Court.

4. Plaintiffs were injured and damaged in their businesses by reason of said matters forbidden in the anti-trust law in the following sums:

Mandeville, for the years 1939 and 1940—$30,071.12.

Zuckerman for the year 1940—$3,528.00.

Evans, for the year 1941—$1,100.00.

5. Plaintiffs are entitled to recover three-fold the [405] said damages suffered by them, together with costs of suit and reasonable attorney fees.

6. Plaintiffs' said causes of action are not barred by any statute of limitations. The cause of action of Evans for 1939 and 1940 crop years was barred by the statute of limitations but are not included in the above damages.

7. Plaintiffs are not in pari delicto with the defendant.

8. Judgment should be entered herein in favor of plaintiff Mandeville Island Farms, Inc., against defendant American Crystal Sugar Company in the sum of $90,-213.36, together with costs of suit; in favor of plaintiff Roscoe C. Zuckerman in the sum of $10,584.00, together with costs of suit; in favor of plaintiff G. K. Evans in the sum of $3,300.00, together with costs of suit; and in favor of plaintiffs Mandeville Island Farms, Inc., Roscoe C. Zuckerman and G. K. Evans in the sum of $25,000.00 as attorneys fees.

9. The second and third counts in the action 4643 should be dismissed without prejudice.

Dated: February 26, 1951.

/s/ BEN HARRISON,
United States District Judge.

EXTRACTS FROM RECORD OF PROCEEDINGS ON NOVEMBER 13, 1945.

(Emphasis added)

"The Court: * * * [R. 284]

"But regardless of that, I think we should look at this case from a practical point of view. What is best for the parties? * * *

"The pleadings here use some very broad language. They speak of the transportation of beets and sugar in interstate commerce.

"I assume the evidence will show the beets were sold to the sugar refinery and were processed and the sugar then entered into interstate commerce.

"Mr. Arndt: *I don't think we allege the beets themselves were in the interstate commerce.*

"Mr. Whyte: *Yes, you do. I assumed that was an oversight.*

"The Court: There is some language with reference to sugar and sugar beets in the complaint. I believe it is on page 7:

"'* * * unlawfully monopolize and restrain trade and commerce in sugar and sugar beets among the several states. * * *'

"Mr. Arndt: *We do not allege, your Honor, that the beets themselves were physically transported.* It is our contention that under the decisions the entire situation was

interstate commerce. *We do not claim that there was a physical transportation of the beets over state lines.*

"The Court: I feel, however, that that allegation precludes the court from making a ruling.

"I feel that if this complaint could be made clear in that respect and the contracts pleaded that a ruling would enable counsel to appeal the case without too much cost. * * *." [P. 286.]

"The Court: I have had this rather frank, informal discussion with counsel to let them know what I have been thinking. I don't know how you gentlemen could approach the subject other than for me to sit here and listen. I was in hopes that counsel would see fit to amend the first cause of action so that we could get a definite ruling because if we try it and then *I should rule as I do now you would be unable to prove that the beets went into interstate commerce* and after going through all those preliminary steps and building up a record I don't know whether you would be any better off or not.

"Mr. Arndt: Then how is it procedurally possible? Suppose I do amend and set forth the contracts? How is is procedurally possible to have an appeal without a trial? I am not going to abandon my second count.

"The Court: *I am not asking you to abandon anything.* I want you to understand I am only trying to be helpful. I want to try to decide this case correctly. At the same time I feel that if these matters could be reached and have a ruling on this question that it would save you both money because if the court rules with you on this first cause of action then the law of the case is going to be established and it would be settled." [P. 299.]

COMPARISON OF DEFENDANT'S PROFITS BEFORE, DURING AND AFTER THE CONSPIRACY WITH THE "NET RETURN" USED AS A BASIS OF PAYING GROWERS.

Crystal's net returns were: (a) Crop year 1938, 3.2973; (b) 1939, 3.123; (c) 1940, 3.163; (d) 1941, 3.970; (e) 1942, 4.246.

Crystal's net profits before taxes for the nearest fiscal year were [R. 212-3]: (a) Fiscal year 1938-39 (April 1 to March 31) $592,674.43; (b) 1939-40 $1,463,058.87; (c) 1940-41 $1,855,574.07; (d) 1941-42 $3,500,094.75; (e) 1942-43 $2,542,226.66.

If we take 2/3 of the 1938-39 profit and 1/3 of the 1940-41 profits in order to secure the profits for the 1938 cropping years and a like method for each succeeding year, we get for the profits of Crystal: (a) Crop year 1938 $882,802.58; (b) 1939 $1,593,897.27; (c) 1940 $2,403,-757.63; (d) 1941 $3,180,805.39.

The data for the fiscal year 1943-44 is not in evidence so the profits for the crop year 1942 cannot be figured by this method.

A comparison of the fiscal year profits of the company with the crop year returns to the grower shows:

A. Profits of Crystal *increased* from $592,674.43 in the 1938-39 fiscal year (April 1, 1948 to March 31, 1939) to $1,463,058.87 in the 1939-40 fiscal year (April 1, 1939 to March 31, 1940), an increase of $870,344.44 or 146%. The net return basis to the growers in the Clarksburg District *decreased* from 3.2973 in the 1938 crop year (August 1, 1938 to July 31, 1939) to 3.123 in the 1939 crop year, or a *decrease* of .11743 or 5.3%. (Profits to Crystal increased 146% but returns to growers decreased 5.3%.)

B. Profits of Crystal increased from $592,674.43 in the 1938-39 fiscal year (April 1, 1938 to March 31, 1939) to $1,855,574.07 in the 1940-41 fiscal year, an increase of $1,262,926.60 or 213%. The net return from the sale of sugar as used in determining payment to growers from the sale of sugar decreased from 3.2973 to 3.163 or a decrease of .1343 or a decrease of 4%. (Profits to the company increased 213% but returns to growers decreased 4%.)

C. Profits of Crystal increased from $592,674.43 in the 1938-39 fiscal year to $3,500,094.75 in the 1941-42 fiscal year, an increase of $2,907,420.32 or 490%. The net return of Crystal from the sale of sugar as used in determining payment to growers increased from 3.2943 in the crop year 1938 to 3.970 in the crop year 1941 or an increase of .6727 or 20.4%. (Profits to the company increased 490% but returns to growers increased only 20.4%.)

D. The conspiracy ended with the end of the crop year 1941. Profits of Crystal dropped from $3,500,094.25 in the 1941-42 fiscal year (the last year of the conspiracy) to $2,542,226.66 in the 1942-3 fiscal year (the first year after the conspiracy), or $957,867.59 or a decrease of 27%, while the net return as used to pay growers increased from 3.970 in the 1941 crop year to 4.246 in the 1942 crop year or .276 or 6.9%. (As soon as the conspiracy ended, profits to the company dropped 27%, while the return to the grower increased 6.9%.)

We next make a like comparison of the crop year, August 1st to July 31st by taking 2/3 of profits of one fiscal year and 1/3 of another, as above explained and comparing these results with the crop year and net returns of Crystal:

A. *Profits* of Crystal *increased* from $882,802.58 in cropping year 1938 to $1,593,897.27 in cropping year 1939, or $711,094.69, or 80.54%, while the return from sugar sale which made up part of the growers *net return decreased* from 3.2973 in 1938 crop year to 3.123 in the 1939 crop year, or a decrease of .1743 or 5.3%. (Profits to company up 80.54% but net return to grower down 5.3%.)

B. *Profits* of Crystal *increased* from $882,802.58 in cropping year 1938 to $2,403,747.63 in cropping year 1940 or an increase of $1,520,945.05, or 172.2%, while during the same periods Crystal's *net return* (as used as a part of the formula in paying growers) *decreased* from 3.2973 in cropping year 1938 to 3.163 in cropping year 1940 or a decrease of 4%. (Profits to company up 172.2%, net return to grower down 4%.)

C. Profits of Crystal increased from $882,805.58 in cropping year 1938 to $3,180,805.39 in cropping year 1941 or an increase of $2,298,002.81 or 260.30%, while during the same period, Crystal's net return (as used as a part of the formula in paying growers) increased from 3.2973 in the crop year 1938 to 3.970 in the crop year 1939 or an increase of .6727 or only 20.4%. (Profits to company up 260.3%, net return up only 20.4%.)

D. The conspiracy ended with the crop year 1941. We do not have the 1943-44 profits of Crystal but we do have the 1942-43 fiscal year profits (after the conspiracy ended). These amounted to $2,542,266.66. The profits for the crop year 1942 (figured on the ⅔-⅓ method above set forth) were $3,180,805.39. The decrease in profits between these two sums is $638,538.73, a decrease of 20.7%. Crystal's net return (as used as a part of the formula used in paying growers) increased from 3.970 in the crop year 1941 to 4.246 in the crop year 1942, or .276 or 6.9%.

EXTRACTS FROM THE UNIVERSITY OF ILLINOIS LAW FORUM FOR WINTER 1950 (No. 4.).

Commencing page 659:

"Recent decisions manifesting a better understanding both of what the anti-trust laws are meant to accomplish within the framework of a free economy and of the difficulties of proof involved have finally made it possible to prove damages wherever they actually exist. This result has come about not by breaking any new paths in the law of damages but merely by the application of principles which go back to common law decisions reported as early as Year Books.

"A graphic illustration of the change that has come about in the law and in the attitude of the courts is furnished by the decision of the Supreme Court of the United States in the case of *Bigelow et al. v. RKO Pictures, Inc., et al.* (327 U. S. 251). The Court of Appeals for the Seventh Circuit had reversed a jury verdict based on the motion picture theatre's loss of profits occasioned by the operation of a business conspiracy which had completely destroyed an open market for a period of some twenty years. The plaintiffs had necessarily found it impossible to compare their theatre's earnings in an open market with the earnings while operating under the restraints of the defendants' illegal conspiracy. The defendants had destroyed any such comparison by destroying an open market. The Supreme Court in reversing the decision of

the Court of Appeals applied no new approach to the problem of proof but went back to ancient decisions for its precedent."

Under the heading "Enforcement Value of the Treble Damage Action," page 665, the article states:

"On analysis it is difficult to see any reason for the highly technical requirements for proving damages as set forth in the earlier anti-trust cases other than a lack of comprehension on the part of the courts as to the meaning of the public policy inherent in the enforcement of these laws. The concept that the future of a free economy is intimately bound up with the freedom of opportunity of small business found in its first modern expression in the opinion of the Supreme Court of the United States in the Schechter case (295 U. S. 495). Ever since the rendition of that opinion, many courts have taken a more jaundiced view of business conspiracies and have begun to exercise a little more ingenuity in working out the rights of private litigants in anti-trust cases. Most courts have, albeit reluctantly, come to the conclusion that the civil treble damage suit is an important and necessary adjunct to the efforts of the Department of Justice in the enforcement of the anti-trust laws. As a result, the legal climate for conspiracy and monopoly has changed drastically because even large industries can feel the impact of million dollar judgments where a five thousand dollar fine in a governmental criminal action can be written off to profit and loss as a business risk."

Under the subheading "Court Attitudes Toward Measure of Damages," the text states (pp. 665-666):

"What has been said above about failure of the courts to understand proper rules of damages to be applied in anti-trust suits cannot be justly ascribed to the decisions of the Supreme Court. Properly analyzed, *its decision in the case of Eastman Kodak Co. v. Southern Photo Materials Co.* (273 U. S. 359) *answers every objection which a defendant could make based on any alleged insufficiency of proof which stemmed from the defendant's own wrongdoing.*"

"This case was followed by the case of *Story Parchment Co. v. Paterson Parchment Paper Co.* (282 U. S. 555), where the Court said:

". . . 'The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery.'"

At page 671 under "Conclusion":

"A fair reading of the recent cases dealing with the sufficiency of proof of damages in anti-trust cases must inevitably lead to the conclusion that legal standards of proof to sustain anti-trust verdicts are viewed in an entirely different light by courts of appeal than heretofore. *The Supreme Court decisions which have been cited and discussed here give support to the use of any theory of damages which has the support from the record of 'a just and reasonable inference' that plaintiffs have been dam-*

aged by an unlawful conspiracy or monopoly under the anti-trust laws.

"From time immemorial the amount of plaintiff's damages has been a question for the jury or the trier of the facts in a civil action. The amount of damages has always been sustained on appeal by any 'probably and inferential as well as any direct and positive proof.' There has been a growing recognition in the courts of the large public interest involved in this type of litigation and, as stated by the Supreme Court in the *Bigelow* case, difficulties of proof are no longer confused with the right of recovery.

"It is the writer's opinion, therefore, that defendants' lawyers are going to have more and more difficulty in using in the future, as they have in the past, arguments in courts of appeal which go to factual as distinguished from legal questions; that is, whether or not the plaintiff was injured, and how much. As stated by the Supreme Court in the cases cited above, 'the constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done.' This is, as has been pointed out above, particularly pertinent in civil suits for treble damages under the anti-trust laws because *the greatest deterrent to the violation of these laws is the prospect of a large money recovery by a plaintiff in a civil suit for treble damages."*

CALCULATIONS OF DAMAGES.

A. Basis of Damages No. 1.

Where sugar was carried over, however, from one cropping year to another and a better price was secured in the carry-over year than was received in the year the sugar was manufactured (as occurred in 1940, 1941 and 1942), the company received the entire benefit of the increase instead of only 50% thereof and the grower received none. Crystal's 1944 and 1945 contracts (made after the conspiracy had ceased), gave the grower the benefit of any increased price in carry-over sales, by providing that the grower was to be paid on the basis of the average net return for the sale of sugar manufactured during the particular crop year, *regardless of when sold,* instead of paying the grower upon the basis of the sugar sold during the particular year regardless of when manufactured. When beets were shipped from Clarksburg to Oxnard (where a better extraction percentage was secured than at Clarksburg, due to the more efficient Steffens Process there), the company received the entire benefit of that extra extraction and the Clarksburg grower received none of it. In 1939, 1940, and 1941 the Oxnard net returns were higher than the Clarksburg net returns. Therefore, as to Northern California beets shipped to Oxnard, the company received the entire benefit of this increased price and the Northern grower received none.

In view of this practice of the company to carry over substantial portions of the Clarksburg sugar into the next crop year, it would be reasonable to take the Clarksburg prices immediately after the conspiracy (1942) and apply them to 1938, 1939 and 1940 crops of the plaintiffs. This would be one basis of damages approved by the Supreme

Court criteria and arithmetically results in the following damages [R. 525]; (a) 1930 Mandeville, $65,459.34; (b) 1940 Mandeville, $62,630.72; (c) 1941 Zuckerman, $15,872.77; (d) 1941 Evans, $5,393.10.

B. Basis of Damages No. 2.

A second method of calculating damages would be to use the average Clarksburg 1937-38 prices for the 1939 crop and to use the Clarksburg 1942 prices for the 1941 crop and to use 70% of the 1940 crop on the 1942 prices and 30% on the 1937-38 prices. This is based upon the fact that 39.917% of the Clarksburg 1940 crop was carried over into the 1941 crop year and should receive the same price as the 1941 crop received and should be considered a part thereof. The balance of the crop, or 60.083%, would then be priced ½ at the 1937-38 prices and one-half at the 1942 prices. ½ of the 60.083% is 30.0415%. Adding this 30.0415 to 39.917% above referred to, gives as a total 69.9585%, or approximately 70%, the figure above used. This gives these arithmetical results, which also represent damages approved by the Supreme Court criteria: (a) 1939 Mandeville, $50,786.37; (b) 1940 Mandeville, $56,118.23; (c) 1941 Zuckerman, $38,907.27; (d) 1941 Evans, $5,393.10.

C. Basis of Damages No. 3.

A third method of calculating damages would be to apply to each of the years here involved (1939, 1940, and 1941) the nearest year of free competition, to-wit, (a) to the 1939 crop year beets to apply the average of 1937 and 1938 Clarksburg prices; (b) to the 1941 crop year beets to apply the 1942 Clarksburg prices; (c) to the 1940 crop year beets to apply half of the 1937-38 Clarksburg prices, and half of the Clarksburg 1942 prices. This

mathematically results in these figures. (a) 1939 Mandeville, $15,749.51; (b) 1940 Mandeville, $38,907.27; (c) 1941 Zuckerman, $15,872.75; (d) 1941 Evans, $5,393.10. These figures, under the Supreme Court criteria, represent damages that the court could have found.

D. Basis of Damages No. 4.

A fourth method would be to apply to the conspiracy years what counsel for defendant said existed as to the growers prior to the conspiracy. "They were growing for us. . . . This sugar setup . . . was a profit-sharing proposition, pure and simple. We would sell the sugar, figure the net return, and they would get a certain percentage of what we got. They were in the same boat as we were. *If we made money, then they made money. if we lost money, then they would lose money.*" [R. 322.] The percentage above referred to was 50%. [Finding 7B, Supp. 37.]

We have heretofore shown how much more the plaintiffs would have received during the conspiracy years if they had been paid under the 50-50 "profit-sharing proposition" and if they had been in "the same boat . . . making money if the company made money." These figures are: (a) 1939 Mandeville, $28,875.35; (b) 1940 Mandeville, $64,117.79; (c) 1941 Zuckerman, $61,-101.74; (d) 1941 Evans, $18,955.31.

These also represent damages approved by the Supreme Court criteria.

E. Basis of Damages No. 5.

Defendant determined whether the beets of a grower would be refined at Clarksburg or Oxnard. The grower had nothing to say about it. [R. 409, 412.] In 1939 it shipped 14,348 out of 22,355.6 tons of Mandeville beets to Oxnard, or over 64%. [R. 342.] In 1949 over 51% of Mandeville beets were so shipped. [R. 342.] In 1941 73% of Mandeville beets were so shipped. [R. 342.] Many of Evans' beets were so shipped but defendant did not know how many and could not ascertain the same [R. 342], so we are entitled to assume that at least the same percentage of Evans' beets were shipped in that year as Zuckerman's, or over 73%. Defendant shipped enough of Northern California beets during each of these years to Oxnard, so that it could have shipped all of the beets of each of the plaintiffs to Oxnard where, because of the more efficient Steffens Process, a greater extraction percentage of sugar was secured and therefore under the 50-50 method of figuring beet prices, a better price was received by the grower for beets. If plaintiffs had a competitive market in 1939, 1940 and 1941, they could have secured the best market and the best market for their beets was Oxnard because of the Steffens Process. Therefore, it would be fair to require defendant to pay to plaintiffs *at least* the amounts that the plaintiffs would have received had they been paid the Oxnard prices. If they had received the Oxnard prices, then they would have received an amount in excess of what they did receive, as follows [R. 345]: (a) 1939 Mandeville, $17,892.18; (b) 1940 Mandeville, $18,153.95; (c) 1941 Zuckerman, $8,757.98; (d) 1941 Evans, $2,374.49.

In the Supreme Court of the United States

October Term, 1951
No. 711

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Petitioner,

vs.

MANDEVILLE ISLAND FARMS, INC., a corporation, ROSCOE C. ZUCKERMAN and G. K. EVANS,
Respondents.

Petitioner's Reply to Respondents' Answer to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petitioner's Reply to Respondents' Answer to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner American Crystal Sugar Company, while regarding it as unnecessary to reply to the numerous and repetitive contentions raised in respondents' answer, deems it important to point out the falsity of one assertion made by respondents; namely that petitioner invited error by persuading the District Court not to make a finding of fact that the activities complained of had a substantial economic effect on interstate commerce but instead persuaded it "to put that finding into the conclusions of law at the instance of petitioner!" (Resp. Answer to Pet. for Cert. pp. 29-30; and see also pp. 7, 12, 33-34.)

In essence the claim of respondents is that conclusion of law No. 3 [R. 270] is, in effect, a misplaced finding of fact which found its way into the conclusions of law *at the instance of petitioner.* In support of this assertion they cite R. 242-243, a reference to defendant's (petitioner's) objections to the second draft of plaintiff's proposed findings of fact, conclusions of law and judgment. Recourse to said objections will reveal the utter baselessness of respondents' claims in this regard. We quote from the portions of such draft material to this discussion:

> "Defendant further objects to said second draft of findings upon the ground that the same is replete with conclusions and surplusage, does not correctly reflect the case as actually tried, and does not comply with the instructions heretofore given by the Court with reference to its preparation. In this connection defendant respectfully suggests that *in order to correctly reflect the holding of the court,** the findings herein, the conclusions of law and the judgment to be rendered should in substance embrace the following, and that any other matters are pure surplusage and relate to matters not actually tried:
>
> * * * * * * * *
>
> "7. A conclusion of law to the effect that this Court regards the holding of the Supreme Court on the previous appeal binding upon it as the law of the case and *for this reason* concludes that the acitvities found had a substantial effect upon interstate commerce and hence comes within the purview of the Anti-Trust laws.

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*Emphasis here, as elsewhere, is supplied.

"8. *A conclusion of law to the effect that this Court is unable to find, from the evidence, that the activities found had any effect upon the price, supply or competitive conditions with reference to sugar.*" [R. 241-243.]

We thus perceive that petitioner's suggestions were made in order to correctly reflect the holding of the District Court, which was that it did not believe that any effect upon interstate commerce had been shown. As the District Judge himself said on motion to amend the findings:

"The Court: I felt that the conspiracy between the refineries had as its real objective the control of the growers and to prevent them from dealing with the refineries that he may have wanted to deal with. In other words, that it more or less limited the grower to the place where he could sell beets and prevented any competition in that respect; but *I didn't feel that it had any effect upon the price of sugar in interstate commerce. That is the reason I put everything in my conclusions of law.* . . ." [R. 810.]

"The Court: . . . *You will remember that I cut out interstate commerce wherever I could find it.*

Mr. Arndt: That was on the basis, as I understood it, that it was a conclusion and not a statement of fact.

The Court: *I am not making a finding of fact. If I had made a finding at all I would have made a finding that it did not affect interstate commerce, but I wouldn't do that in view of the Supreme Court's decision.*" [R. 811.]

The following colloquy, which took place at the hearing of the motion in question, not only showed misgivings on the part of counsel for petitioner which are fully justified by the disingenuous contentions of respondents, but also further evidences the intention of the Court to make no finding at all on the subject of interstate effects:

> "Mr. Works: I think I have been very patient throughout this whole case, but Your Honor will recall we were ensnared on that first appeal by a situation where we understood and I think Your Honor understood—I know I did, that all that was alleged in that complaint—
>
> The Court: Where I made a mistake was not trying the case first.
>
> Mr. Works: That is true.
>
> The Court: I thought I was doing you a favor but instead I have made a lot of extra work.
>
> Mr. Works: I certainly don't want the same situation to happen on this forthcoming appeal that happened on the last one. *If this* is left in here there will be an argument that Your Honor found there was a restraint of competition upon sugar, the interstate product, precisely the same thing that the Supreme Court was dealing with on the first appeal.* I don't want to get caught off base again.
>
> The Court: *I wouldn't be surprised if the court sends this case back for a specific finding of fact on the sugar, but I have felt I should not do that in view of the Supreme Court's decision.*" [R. 812.]

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*A finding, apparently inadvertent, implying a lack of competition as to sugar interstate. It was stricken on motion of petitioner [R. 274-276].

The result is that respondents' contention that Conclusion of Law No. 3 is in reality a misplaced finding of fact on the vital issue of interstate effects, and as such made at the instance of petitioner, is wholly belied by the record.

The short of it is that the District Judge could not find as a *fact* that the activities complained of had a substantial economic effect upon interstate commerce and he so stated. But, as a conclusion of *law* (erroneous, we submit), he thought the language of the previous decision of this Court forced him to adopt the position that they did have such effect, despite his contrary views on the *facts*.

For the aforementioned reasons respondents' charge that petitioner sought to induce the District Court to commit error is utterly unfounded.

Respectfully submitted,

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